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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL EDWARD PINCH

Petitioner

-against-

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

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QUESTIONS PRESENTED

1. Whether North Carolina has violated the Sixth and Fourteenth Amendments as interpreted by Witherspoon v. Illinois, 391 U.S. 510 (1968), by employing its rule that prospective jurors expressing more than general objections to the death penalty may be excused for cause to exclude:

(a) a juror who did not think she could impose the death penalty; and

(b) a juror who could consider the death penalty but would lean towards life imprisonment?

2. Whether petitioner's death sentence was imposed without full individualized consideration of mitigating factors regarding his mens rea, character, mental development, family relations, and remorse for his crimes so as to constitute cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments to the United States Constitution?

3. Whether the North Carolina Supreme Court misinterpreted Furman v. Georgia, 408 U.S. 238 (1972), in construing its death penalty statute to require - instead of permit - a capital verdict if the jury made three separate fact findings regarding aggravating circumstances when the sole ground for the holding was the court's belief that its construction of the statute was compelled by this Court's decisions condemning unbridled jury discretion?

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NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL EDWARD PINCH

Petitioner

-against-

STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF NORTH CAROLINA

Petitioner, Michael Edward Pinch, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of North Carolina is reported at ___ N.C. ___, 292 S.E.2d 203 (1982), and is attached as Appendix A.

JURISDICTION

The opinion of the Supreme Court of North Carolina was issued on June 2, 1982. The judgment of the Supreme Court of North Carolina was issued on June 22, 1982, and is attached hereto as Appendix B. On July 23, 1982, Justice Brennan extended the time for filing this petition to and including August 31, 1982. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3), petitioner having

asserted below and asserting herein deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides, in relevant part:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . .."

and the Eighth Amendment to the Constitution of the United States, which provides:

> "Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

and the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

This case also involves the North Carolina death penalty statute, N.C. Gen. Stat. §15A-2000 et seq., which is attached as Appendix C.

STATEMENT OF THE CASE

On January 29, 1980, the petitioner was arrested in Anaheim, California, pursuant to a Law Enforcement Bulletin, by the Anaheim police for two murders committed in Greensboro, North Carolina. Rpp. 151-153. On February 4, 1980, the petitioner was indicted for two counts of first degree murder. Rpp. 3-4. The case was tried as a capital case with the trial beginning on August 25, 1980. Rp. 52. The jury was death qualified and, after the State presented all its evidence, the jury returned verdicts of guilty of two counts of first degree murder. Rp. 273.

The facts recited below concerning the crimes will be taken substantially from the facts as stated by the North Carolina Supreme Court in its decision. State v. Pinch, 292 S.E.2d at 210-212. The State's evidence came from primarily two sources: (1) the petitioner's confessions and (2) the testimony of five of his friends. Prior to trial all five were charged with the first degree murder of the two victims in this case. At trial all five testified for the State.

"In relevant part, the evidence for the State tended to show the following. On October 16, 1979, defendant, a nineteen year old white male, was walking on Merritt Drive in Greensboro with his friend Jimmy Eanes when he happened to meet Freddie Pachaco. Defendant did not like Pachaco because he had been friendly with a girl defendant liked and had, without proper entitlement, worn the personal insignia ('colors') of a motocycle gang on his jacket. On this occasion, defendant told Eanes that he 'hated that punk' (Pachaco) and wanted to fight him right then and there. This did not occur, however, because Pachaco was conciliatory and offered defendant some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Sometime later, Pachaco asked defendant outright whether he was 'after' him. Defendant replied that he was not and further said that 'if [he] was going to kick [Pachaco's] ass, [he] would have already done it.'

"On the following day starting at about noon, several people began to congregate at the trailer, where defendant apparently lived, to drink beer and listen to music. The merrymakers included Jimmy Eanes, Shawn Feeney, Keith Way, Bill Stanley and Leslie Hearl (who later married Stanley before trial). Pachaco and his friend Tommy Ausley also unexpectedly joined the party and brought two cases of beer.

Everybody was calm and pleasant and seemed to be having a good time. However, defendant told several of his friends during the course of the party that he disliked, or didn't have 'much use for,' Pachaco and said he would like to kill him. Later in the evening, defendant took Feeney's shotgun and fired at the clothesline three times. A deputy sheriff came to the trailer to investigate the disturbance, but he soon departed after talking to defendant.

"Upon defendant's suggestion, everyone decided to leave the trailer and go to the Stroker Motorcycle Clubhouse, which was located in some woods near Kendover Avenue in Greensboro. Defendant had reasoned that they could make as much noise as they wanted to out there and get more beer besides. It was approximately 10:00 p.m. While everyone prepared to move, defendant quickly slipped out to a nearby trailer where he borrowed a shotgun. He returned with the gun and told Eanes to ride with Pachaco and Ausley to make sure they got to the clubhouse. The entire party then proceeded to the rendezvous in various vehicles, caravan style. En route, defendant retained the shotgun and told his companions that he was going to kill Pachaco and Ausley.

"When the group arrived at the clubhouse, defendant opened the door while he continued to hold the shotgun. Once inside, the members of the party played games, drank beer and listened to music. Billy Stanley and Leslie Hearl left the company and went into an adjacent room to have sexual intercourse. While everyone else engaged in these various recreational activities, defendant sat silently behind the bar with the shotgun in his lap. Sometime later, defendant gave his knife to Eanes and instructed him to cut Pachaco's jugular vein and promised to back him up with a shotgun. Eanes attacked Pachaco but only succeeded in

cutting him on the throat. Pachaco became all emotional at this point but did not fight back. Ausley attempted to help Pachaco and was confronted by Eanes who threw a chair at him. At this point in the evening's events, the testimony of the eye-witnesses differed somewhat. Nevertheless, the overall weight of that testimony combined with the evidence of defendant's own pre-trial statements to law officers tended to show the following occurrences.

"Immediately after the throat-slashing incident between Eanes and Pachaco, defendant raised the shotgun and pointed it at Pachaco. Pachaco told defendant, 'I will go down laughing.' Without saying a word, defendant shot him in the chest. Defendant then turned toward Ausley, whom he had never seen before that day. Ausley pleaded with defendant and said, 'don't shoot me,' '[n]o, not me.' Defendant shot him anyway. Pachaco was still moaning. Defendant walked over to where he lay helpless on the floor and shot him again at point blank range just below the heart. Pachaco and Ausley died from the gunshot wounds. During the shootings, defendant had 'a sort of grin' on his face.

"Defendant, apparently with a full realization of what he had just done, walked outside to the porch of the club-house and told Feeney and Way that he had 'blown away' two dudes. He then directed everyone to help him dispose of the bodies. The bodies were placed in an automobile which Eanes drove to Causey Street and abandoned in a ditch. Defendant did not return to his residence; instead, he went home with Stanley and Hearl. On the way, he told Stanley that he had killed Pachaco and Ausley because he 'didn't have any use for people like that.' Defendant was not upset and seemed to have no regrets about the murders. He went to sleep. The next day, Stanley and Hearl returned to the clubhouse at

defendant's behest and cleaned up the blood on the floor. Another member of the Stroker motorcycle gang painted the steps to conceal bloodstains.

"The bloody car and bodies of Pachaco and Ausley were discovered in the early morning hours of October 19, 1979. Defendant took a bus to California where he was subsequently arrested on January 18, 1980. Defendant waived extradition on February 4, 1980, and was picked up by two officers of the Greensboro Police Department two days later. During the flight back to North Carolina, defendant made a full confession to the murders. He was advised of his constitutional rights and executed the required waiver form.

"Defendant presented no independent evidence during the guilt determination phase of the proceedings. The defense did, however, elicit evidence during cross-examination of prosecution witnesses tending to show that defendant was drunk when the killings occurred." State v. Pinch, ___ N.C. ___, ___-___, 292 S.E.2d 203, 210-212 (1982); Appendix A.

During the sentencing phase, two aggravating circumstances were submitted to the jury: (1) Was the murder heinous, cruel and atrocious, and (2) Was the murder part of a course of conduct in which Michael Edward Pinch engaged and did that course of conduct include the commission by the petitioner of other crimes of violence against another person. 292 S.E.2d at 212. The State did not present any evidence and rested on the evidence in the guilt phase. The State argued that the murders were especially heinous, cruel and atrocious. To show that the defendant engaged in a course of conduct that included the commission of other crimes of violence against another, the State used one murder (Pachaco's) for the crime of violence as to Ausley and used Ausley's murder for the crime of violence as to Pachaco.

Petitioner put on evidence to support numerous mitigating circumstances. His evidence showed that he was 19 at the time of the homicides. He had been living on his own since the age of 13. His mother and father had been divorced for a long time and the petitioner had been close to his father. When the mother remarried and found out that her new husband had homosexual tendencies, she sent petitioner to live with his father. From that point on, he was on his own. He never stayed with his father. He was constantly drinking and taking drugs. Witnesses testified that there was not a day when petitioner was not on drugs or drinking. Rpp. 289-291, 286.

Dr. Billy Royal testified that when he examined petitioner for competency, he found out that petitioner had liver problems that were the result of long and heavy drinking. He testified that the tests he performed showed that petitioner had an I.Q. of 66 and showed signs of depression, conflicts relating with people and poor judgment. He testified that petitioner's depression was ongoing, chronic and had been long standing. Rp. 284. Dr. Royal also testified that he had discussed the homicides with petitioner. At the time of his interview, petitioner felt no particular remorse about the killing of Pachaco. He felt like there was just no alternative. Rp. 285. He did, however, feel remorse and confusion about the killing of Ausley. Rp. 285. Dr. Royal concluded by stating that based on his conversations with petitioner and the tests that he performed, he did not think that the petitioner was basically a violent person. There was also no evidence from the tests or conversations that petitioner, in anything he said or did, was attempting to manipulate the system or con anyone. Rp. 285.

Dr. Allen Sherrow testified for petitioner as an expert in the diagnosis and treatment of persons addicted to alcohol and drugs. Dr. Sherrow testified that petitioner had a long history of drug and alcohol abuse, going back to the age of 12. Rp. 293. Dr. Sherrow had discussed with petitioner the use of alcohol on the night of the homicides. Dr. Sherrow stated that he was unable to determine the amount of alcohol petitioner consumed and whether that level affected petitioner because he was not given access to the other witnesses. Rp. 293. He testified that he could not give an opinion to a medical degree of certainty as to whether the petitioner was affected by the consumption of alcohol at the time of the homicides. He had an opinion based on what the petitioner had told him, but he was not permitted to express that opinion. Rpp. 295-296. See Appendix D14-D17.

The petitioner attempted to introduce other evidence in mitigation, most of which related to his remorse about the crimes, his changed attitude, his desire to change and lead a useful life, his feelings of sorrow and regret for causing pain to his family, his love for his family and friends and his regret for prior drug addition and overdoses. This evidence was excluded by the court. Rpp. 287, 288, 297-299, 278, 285. See Appendix D4-D11.

After arguments to the jury and the court's instructions, the jury returned a verdict of death on both counts. The jury found both aggravating circumstances beyond a reasonable doubt. Rpp. 341, 344. It found that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty. Rpp. 342, 344. It found some (or at least one) mitigating circumstance, but was directed by the court not to indicate which mitigating

circumstance(s) it found. Rpp. 342, 345, 335. The jury then found that the mitigating circumstances did not outweigh the aggravating circumstances and was therefore directed to return verdicts of death, which it did. Rpp. 336, 343, 346.

From the judgments of conviction and sentences of death, the petitioner appealed. The decision of the Supreme Court of North Carolina affirming the convictions and sentences was issued on June 2, 1982. ___ N.C. ___, 292 S.E.2d 203; Appendix A.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. Petitioner asserts that two prospective jurors were removed from his jury in violation of the limitations imposed by Witherspoon v. Illinois, 391 U.S. 510 (1968). The trial record showing the voir dire examination of prospective jurors Mary D. Neal and Frank J. Rogers is set out at Appendix D1-D4.

Petitioner noted in the record appropriate exceptions, Rpp. 102, 68, and made the following assignment of error:

> The Court erred in excusing for cause jurors Rogers . . . and Neal because of their views about capital punishment in violation of the principles as established by the United States Supreme Court in Witherspoon v. Illinois, and subsequent cases.

Rp. 358. He argued this contention in his brief. Defendant-Appellant's Brief, pp. 12-27.

The majority below rejected the contention regarding prospective juror Rogers along with six others by the assertion:

> It is unmistakably clear that seven of the eight potential jurors were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant.

292 S.E.2d at 213.

It specifically overruled petitioner's argument regarding Mary Neal, citing State v. Avery, 299 N.C. 126, 261 S.E.2d 803 (1980):

> It is equally clear that the remaining juror, Mary Neal, was also correctly removed from the panel when, after some initial equivocation, she finally stated that she did not 'believe' that she could impose the death penalty regardless of the evidence. The court thereupon asked her, 'Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?' Ms. Neal replied, 'No, I just don't think so.' Considering her answers contextually, we find that Ms. Neal expressed a sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. State v. Avery, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980).

Ibid.

Justice Exum dissented from these holdings. 292 S.E.2d at 236-240. He concluded that "[a]t least two jurors were excluded for cause in the instant case in violation of the limitation imposed by Witherspoon v. Illinois, 391 U.S. 510 (1968) . . .." Id. at 236-237.

He found that the most that could be said about Ms. Neal was that "her attitude toward the death penalty 'affected' her deliberation . . ." as in Adams v. Texas, 448 U.S. 38 (1980), which would be insufficient cause for exclusion under Witherspoon. 292 S.E.2d at 240.

> Neal never 'unmistakably' said that she would not impose the death penalty, or that she would 'automatically' vote for life imprisonment, regardless of what the evidence might show. She said she didn't 'believe' and didn't 'think' she could vote for death. She never said, absolutely, that she could or would not. She should not have been excused for cause.

Ibid.

Rogers' statement that he "would lean toward life imprisonment" was not, for Justice Exum, altered by his assent to the trial court's question.

> Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence that might be introduced at the trial. He said he could not impose it under any circumstances 'without hearing any

evidence.' Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, and to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Rogers' position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one way or the other without hearing some evidence. Rogers should not have been excused for cause.

Ibid. (Emphasis in original).

2. Petitioner is urging here that his jury was improperly limited in its consideration of mitigating circumstances in several respects.

(a) How Raised in Trial Court

(i) Petitioner testified during the penalty phase of his trial. A police officer had earlier testified that after his arrest, petitioner had said he had not regretted killing Pachaco. Petitioner was questioned about this:

> After the shootings I recall being arrested in California. I recall making some statements to the Greensboro Police Department after I had been arrested. I remember telling the officers that I did not regret shooting Freddie Pachaco.
>
> Q. Michael, how do you feel about that now?
>
> A. I regret it.
>
> MR. WANNAMAKER: Object to how he feels about it now, if your Honor please. It is irrelevant.
>
> THE COURT: Objection sustained. EXCEPTION NO. 119
>
> I have changed in the way I feel about Freddie Pachaco and the shootings. I've been away from drugs and drinking and everything and I've been locked up and my head has been cleared. I've done a lot of thinking about it. As a result of

> that thinking, I regret that I did it. It's the biggest mistake I've ever made in my life. I have completed the ninth grade. Rp. 278.

(ii) Sherry Olivey, a friend of petitioner's, testified in the penalty phase. Testimony from her about his use of alcohol and drugs before and after the crimes and about his remorse for his crimes was excluded. The relevant portions of her testimony are set forth at Appendix D4-D6.

(iii) During the direct examination of petitioner's mother, Louise Nixon, petitioner sought to introduce five letters from him to her written while he was in jail pending trial on these charges. The trial court excluded two of the letters in their entirety and portions of two others. The portions of the trial record showing Mrs. Nixon's testimony and the letters are set out at Appendix D6-D11.

(iv) Petitioner presented an expert witness, Dr. Allen Sherrow, a psychiatrist, with training and experience in alcohol and drug abuse and forensic psychiatry. Dr. Sherrow was called to give his opinion regarding the effect of the alcohol petitioner had consumed prior to the shooting. During jury selection, petitioner filed a motion requesting an order permitting Dr. Sherrow to interview the State's witnesses who observed petitioner during the period of his incarceration so that the doctor could express an opinion as to the effect on petitioner of his alcoholic consumption. The portions of the record showing petitioner's motion, the order denying it and the proceedings leading to its denial are reproduced at Exhibit D11-D13.

When Dr. Sherrow testified, the Court sustained a series of objections by the State to questions seeking to elicit his opinions regarding effects of petitioner's alcoholic consumption. Dr. Sherrow's testimony is reproduced at Appendix D14-D17.

(v) The petitioner, pursuant to established practice, filed a timely written request to the trial court as to those mitigating circumstances, both statutory and otherwise, for consideration by the jury which he contended were supported by the evidence. It included:

> Offer of Mitigating Circumstances (filed September 9, 1980)
>
> NOW COMES the defendant, by and through counsel, pursuant to N.C.G.S. 15A-2000(f), and offers the following mitigating circumstances to be considered by the jury in these cases:
>
> • • • • •
>
> 7. The defendant . . . has a relatively low mentality. Rpp. 274-275.

The trial court refused to so instruct the jury. The record specifically shows:

> The Court refused to submit to the jury as a possible mitigating circumstance defendant's low mentality.

Rp. 277.

(b) How Presented and Raised in the North Carolina Supreme Court.

(i) Petitioner grouped all of the exceptions to the rulings listed above excluding evidence, 2(a)(i)-(iv), supra, under the following assignment of error.

> The defendant was denied his right to be free from cruel and unusual punishment; his right to present a defense, his right to a fair sentencing trial and his right to due process of law when the Court prevented the

> defendant from presenting relevant, material evidence in mitigation of the crimes charged, all in violation of the Eighth and Fourteenth Amendments to the United States Constitution . . ..

Rp. 369. Petitioner brought forward this assignment of error in his brief. Defendant-Appellant's Brief, pp. 52-56.

(ii) Petitioner made the following additional assignment of error regarding the ruling denying his request that the State make its witnesses available to Dr. Sherrow, see 2(a)(iv) supra:

> The Court erred in denying the defendant's Motion to Allow Witness Interviews by the defendant's Medical Expert and in doing so deprived the defendant of his right to effective assistance of counsel, the right to present a defense, a fair trial, a fair sentencing proceeding, due process of law and equal protection all in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution . . ..

Rpp. 358-360. This assignment of error was presented in petitioner's brief. Defendant-Appellant's Brief, pp. 28-30.

(iii) Petitioner made the following assignment of error regarding the court's refusal to submit his low mentality as a mitigating circumstance, 2(a)(v), supra:

> The court erred in denying defendant's motion to submit as a mitigating circumstance the defendant's low mentality in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Rp. 368. Petitioner argued the assignment of error in his brief. Defendant-Appellant's Brief, pp. 61-63.

(c) How Passed on by North Carolina Supreme Court

(i) The court below rejected defendant's argument that mitigating evidence was wrongly excluded. 292 S.E.2d at 219-220. The court

explicitly recognized that petitioner's argument was grounded in his right "to be free from cruel and unusual punishment" and cited Lockett v. Ohio, 438 U.S. 586 (1978). Id at 219. It stated its general view on admissibility of mitigating evidence as follows:

> The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.

From this proposition, however, it set forth the following harmless error rule:

> Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error.

Ibid.

(ii) With respect to the exclusion of petitioner's testimony regarding his remorse for the death of Pachaco, 2(a)(i), supra:

> It is true that the trial court sustained an initial and single objection to defendant's testimony about his current feelings of remorse over Pachaco's death; nevertheless, defendant thereafter proceeded to testify in detail about his change in heart and regret without further objection by the prosecutor. Record at 278-79. In addition, Dr. Royal, a forensic psychiatrist, testified about defendant's expressed remorse over Ausley's death. Record at 285.

Ibid.

(iii) As to the exclusion of the O'Ivey testimony on petitioner's remorse, (2)(a)(ii), supra:

> Since substantial evidence of defendant's regrets had already been received, it was not error for the court to exclude (upon objection)

further testimony upon the same subject by the witness Sherry Olivey. In any event, defendant later succeeded in introducing more evidence about his repentant statements since the killings through the testimony of his sister and mother. Record at 289, 291-92.

Ibid.

Regarding excluded evidence from her on petitioner's difficulties with drugs and alcohol:

> Defendant also maintains that the trial court erred in not permitting Sherry Olivey to testify about the circumstances of his various hospitalizations for drug overdoses. We disagree. Ms. Olivey testified that she knew of occasions where defendant had taken a drug overdose and that she had visited him in Cone Memorial Hospital three months after the crimes. Certainly, defendant's habits regarding alcohol and drug misuse were relevant mitigating factors for the jury's consideration; however, the precise details of his particular overdoses were not pertinent to his sentencing. It was enough that the jury was informed by Ms. Olivey that:
>
> > I can honestly say that he [defendant] drank or took something every day that I've known him [two years] . . .. He always went to the max on everything to where he couldn't walk anymore or was passed out. I have seen him when he has gone too far in the use of alcohol or the use of drugs. I have seen him take alcohol or drugs to the point where he is unconscious or in some state like that. Record at 286-87.
>
> Id. at 220. (Emphasis in original).

(iv) Regarding the refusal to admit letters from petitioner to his mother from the Guilford County Jail, 2(a)(iii), supra,

> We likewise find no reversible error in the trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial. These letters added little to the in-court testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it. Even so, the trial court permitted defendant's mother to read to the jury all of exhibit five and portions of exhibits three and four in which defendant had essentially stated, both in prose and poem, that it hurt him to know that he was capable of taking another's life, that he was living for the

> future and cleaning up his act, and that he had a mature and sincere desire to fulfill his part in life and society properly. Record at 297-99. The letters totally excluded by the court, exhibits one and two, merely repeated the same things, howbeit using different words or examples, about his remorse and his wish to be a better person. Moreover, these two letters included much material which plainly was not relevant to sentencing, i.e., his apologies to his mother for not having been a better son to her despite her good efforts and his rambling philosophical questionings about why he had turned out to be so bad.

Id. at 219-20.

(v) With respect to the testimony of Dr. Sherrow, (2)(a)(iv), supra, the court acknowledged that petitioner's arguments were constitutionally based, 292 S.E.2d at 213, 219, but rejected them, id. at 213-215; 219-220.

> Defendant finally challenges the trial court's refusal to admit certain expert testimony. These contentions lack merit . . .. The trial court also properly excluded the opinion of another psychiatrist about defendant's blood alcohol levels at the time of the shootings. Clearly, such evidence would have been relevant; however, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of medical certainty, the evidence was unreliable and lacked probative value.

Id. at 220.

(vi) With respect to petitioner's claim that the trial court should have charged and included on the list submitted to the jury as a mitigating factor that the "defendant has a relatively low mentality," the majority of the court acknowledged:

> that the trial court must include additional factors [to those listed in the statute, N.C. Gen. Stat. §15A-2000(f)], that are timely requested by the defendant, on the written list submitted to the jury if they are 'supported by the evidence, and . . . are such that the jury could reasonably deem them to have mitigating value . . ..' State v. Johnson [I], 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979) (emphasis added).

Id. at 223. It further concluded that a defendant's mentality is generally a factor in mitigation, but that petitioner's request was somehow off the mark.

> We first analyze defendant's request for an instruction upon his 'relatively low mentality.' This factor is not listed in G.S. §15A-2000(f); however, our cases plainly indicate that the mentality of a defendant is generally relevant to sentencing and that it can, with supporting evidence, be properly considered in mitigation of a capital felony. See State v. Johnson, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979), and part VII of the opinion, supra. In this case, a psychiatrist testified that defendant had scored 66 on an intelligence test. This fact unquestionably related to defendant's mentality, and we believe defendant would have been entitled to an instruction about his specific intelligence quotient if he had tendered a properly worded request therefore. See, e.g., State v. Williams, 304 N.C. 394, 401, 284 S.E.2d 437, 443 (1981); State v. Rook, 304 N.C. 201, 211 n.1, 283 S.E.2d 732, 739 (1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). However, we do not believe that defendant's evidence adequately authorized the submission of the instruction he did request which used the terms 'relatively low mentality.' In this regard, the psychiatrist testified that defendant's 'other tests indicated that his I.Q. was probably a little higher than [66] and fell at least into the low-normal range of intelligence.' Although we are not schooled in the medical art of psychiatry, we think that one would not commonly understand low to normal intelligence to be reasonably synonymous with relatively low mentality. Consequently, we hold that the trial court did not err in refusing to instruct the jury in this respect.

Id. at 224. (Emphasis in original).

It further held that, even if erroneous, the error was harmless:

> In any event, the omission could not have possibly been prejudicial since the trial court told the jury it could evaluate '[a]ny other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value.' G.S. 15A-2000 (f)(9).

Ibid.

The court had previously ruled that a defendant has the burden of "affirmative establish[ing]

. . . that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant." Id. at 223-24.

Justice Exum dissented on this point. 292 S.E.2d at 240-242. He believed that the evidence fully supported petitioner's request:

> The evidence supports that he did have a 'relatively low mentality.' It should be for the jury to assess this quality in terms of its mitigating effect. It is not for the court to say that the jury could not, as a matter of law, consider a person's 'relatively low mentality' as a mitigating circumstance because the mentality is within the outer limits of 'normal.' To me, the phrase 'relatively low mentality' accords precisely with the evidence which was introduced. A person whose intelligence is in the low-normal range must perforce have a relatively low mentality. Contrary to the majority's conclusion, the terms are synonymous.

Id. at 241.

Moreover, concluding based on Eddings v. Oklahoma, ___U.S. ___, 102 S.Ct. 869, 877, 71 L.Ed.2d 1, 12 (1982), that the mitigating circumstances of petitioner's mental development could not, consistent with the Eighth Amendment, be limited, 292 S.E.2d at 241, and that the burden of establishing that the error was harmless was on the State to prove beyond a reasonable doubt, he thought the error was not harmless. Id. at 241-242.

3. The trial court charged the jury that, "it would be your duty in each case . . . to recommend that the defendant be sentenced to death," R.p. 336, upon making certain fact findings. In the record on appeal, petitioner noted an appropriate exception, R.p. 336, and made an assignment of error, complaining that the "court erroneously instructed

the jury that if the jury found the aggravating circumstances outweighed the mitigating circumstances they must return a recommendation for the death penalty . . .." R.p. 373. At the time of petitioner's trial, no contemporaneous objection was required to preserve an error in the jury instruction for appellate review. N.C. Gen. Stat. §15A-1446(d)(13). N.C. Gen. Stat. §15A-1446(d)(13) provides:

> (d) Errors based upon any of the following grounds, which are asserted to have occurred, may be the subject of appellate review even though no objection, exception or motion has been made in the trial division . . . . (13) Error of law in the charge to the jury.

Petitioner argued at length in his brief on appeal, Defendant-Appellant's Brief, pp. 75-96, that "the court improperly directed the jury to automatically recommend a sentence of death if it found that the aggravating circumstances are sufficiently substantial to call for the imposition of the death penalty and that the aggravating circumstances outweigh the mitigating circumstances." Id. at 75. The State argued in response that the construction of the statute urged by petitioner would violate the Eighth and Fourteenth Amendments as interpreted by this Court. Brief for State, pp. 67-73. It summarized its position with the following assertion: "If the jury were allowed to make the further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman [v. Georgia, 408 U.S. 238 (1972)] simply does not allow." Id. at 72.

Petitioner had anticipated the State's argument in his brief in chief. See Defendant-Appellant's Brief, pp. 79-86, 88, 91. A recapitulation of petitioner's position was:

> If the Georgia statute approved in Gregg [v. Georgia, 428 U.S. 153 (1976)], is sufficiently guided, if the Florida statute approved in Proffitt [v. Florida, 428 U.S. 242 (1976)] has sufficient standards, and if the Model Penal Code is also constitutional, then, under G.S. §15A-2000, as written, and with the construction

> urged here, the 'jury's discretion' is more than sufficiently 'channelled,' 'it is always circumscribed by legislative guidelines.' Gregg, 428 U.S. at 206-07. This must be so because G.S. 15A-2000 contains more standards and requires more findings than any of the other three.

Id. at 88.

The North Carolina Supreme Court divided on the constitutional question argued by the parties. The majority concluded that the instructions given were proper, 292 S.E.2d at 226-227, because petitioner's construction of the statute would allow the jury "arbitrarily or capriciously [to] impose or reject a sentence of death" and "to exercise unbridled discretion . . .." 292 S.E.2d at 227. It further determined that petitioner's "contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979) . . ." and quoted from that case where it had said that "'[t]he exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman [v. Georgia, 408 U.S. 238 (1972)] and the cases which have followed it.' Id. at 35, 257 S.E.2d at 590." 292 S.E.2d at 227.

Justice Exum dissented. 292 S.E.2d at 230. He wrote:

> The majority construes that statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court . . . have made it abundantly clear that the majority's interpretation is not constitutionally required.

Ibid. He proceeded to determine that the instruction given was inconsistent with the statute and "tilts too much in favor of consistency at the expense of individualized consideration." 292 S.E.2d at 236. See, also, id. at 234. He, therefore, thought petitioner should receive a new sentencing hearing. Id. at 242.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER THE NORTH CAROLINA SUPREME COURT'S INTERPRETATION OF WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968) ALLOWING FOR EXCLUSION OF JURORS WHO DO NOT CATEGORICALLY STATE THEY COULD NOT IMPOSE DEATH IN ANY CASE DEPRIVES PETITIONER OF HIS LIFE WITHOUT DUE PROCESS OF LAW.

A. The "I don't believe so" juror.

In the Court below the petitioner claimed that the exclusion for cause of juror Mary Neal was in violation of this Court's decisions in Witherspoon v. Illinois, 391 U.S. 510 (1968); Davis v. Georgia, 429 U.S. 122 (1976), and Adams v. Texas, 448 U.S. 38 (1980). Mrs. Neal was excused for cause after she had expressed her feelings concerning the death penalty in the following manner:

Q. Do you have any objection to the death penalty?

A. Well, that's a hard question to answer.

Q. Yes, ma'am.

A. I've never been able to answer it like a cut and dried thing. It's hard for me, very hard for me to make decisions, I've never been able to make decisions very well. I had someone to help me, but I'm hard to convince too. I almost have to see something before I could really say so. That's the only way I know to answer you.

Q. Let me ask you that question in a different way.

A. All right.

Q. First of all, you don't have any objection to the death penalty generally, is that what you're saying or do you?

A. Well, there again, I really don't know. It's just hard to say. I guess if you knew for a fact, if I saw something done, I would go along with it.

Q. Let me ask that question in a different way, Mrs. Neal, if you're a member of this jury and we get to the second part of the trial, that means you've already found him guilty of murder in the first degree in one or both cases, based on the evidence in this case, what happened in this case and based on the law that Judge Walker gives to you, as he tells you the law, if you deem it to be appropriate, could you impose the death penalty?

A. I don't think so, I really don't believe so.

Q. I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, ma'am, that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence.

A. I don't know. I guess if it was proven to me, I guess I could.

Q. If what was proven to you?

A. I would have to be -- I would have to absolutely know for sure, I mean no doubt whatsoever.

Q. Now understand you would have already found him guilty of murder in the first degree or we would not be at the sentencing phase, so his guilt would have been established or you would not have found him guilty. At this point you would be determining what sentence to impose based on the law that the Judge gives you and based on the facts, based on what he did, what you've already found him to have done. At that point, could you impose the death penalty if you found it to be appropriate and in accordance with the law that the Court gives you or would you not -- would you simply not impose the death penalty under any circumstances? I have to kind of keep after you on this point because it is crucial.

A. I still don't know, I'd rather not.

Q. You would rather not -- can you envision a situation where you could impose the death penalty?

A. Like I said, if I saw it happen.

Q. You mean if you were an eyewitness to the crime?

A. Right.

Q. You are not going to be that.

A. That's right.

Q. As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.

A. Okay, already proven guilty -- if I went along with the guilty part, if I decided they were guilty -- no, I will not.

Q. You could not impose the death penalty regardless of what the evidence is?

A. I don't believe so.

MR. WANNAMAKER: If your Honor please, we challenge for cause.

THE COURT: I understand, Mrs. Neal. I know this is very difficult for you but it's necessary to have your candid and frank answers and I thank you for them.

Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL: No, I just don't think so.

Rpp. 100-101. See also, State v. Pinch, (Justice Exum's dissent), 292 S.E.2d at 239.

A divided[1] North Carolina Supreme Court held in reliance upon State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980), that Ms. Neal was properly excused.

> Considering her answers contextually, we find that Ms. Neal expressed sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. State v. Avery, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980); See State v. Taylor, 304 N.C. 249, 266, 283 S.E.2d 761, 773 (1981).

Pinch, 292 S.E.2d at 213.

The North Carolina Supreme Court has had numerous cases raising the question of whether certain jurors were excused for cause in violation of Witherspoon v. Illinois, supra.[2]

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1 Justice Exum dissented. 292 S.E.2d at 236-240.

2 State v. Spence and Williams, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Atkinson, 275 N.C. 288, 167 S.E.2d 241 (1969); State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969); State v. Roseboro, 276 N.C. 185, 171 S.E.2d 886 (1970); State v. Miller, 276 N.C. 681, 174 S.E.2d 481 (1970); State v. Sanders, 276 N.C. 598, 174 S.E.2d 487 (1970); State v. Atkinson, 278 N.C. 168, 179 S.E.2d 410 (1971); State v. Westbrook, 279 N.C. 18, 181 S.E.2d 572 (1971); State v. Doss, 279 N.C. 413, 183 S.E.2d 671 (1971); State v. Chance, 279 N.C. 643, 185 S.E.2d 227 (1971); State v. Frazier, 280 N.C. 181, 185 S.E.2d 652 (1972); State v. Cook, 280 N.C. 642, 187 S.E.2d 104 (1972); State v. Anderson, 281 N.C. 261, 188 S.E.2d 336 (1972); State v. Jarrette, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); State v. Lampkins, 286 N.C. 497, 212 S.E.2d 106 (1975); State v. Monk I, 286 N.C. 509, 212 S.E.2d 125 (1975); State v. James Avery, 286 N.C. 459, 212 S.E.2d 142 (1975); State v. Simmons, 286 N.C. 681, 213 S.E.2d 280 (1975); State v. Bock, 288 N.C. 145, 217 S.E.2d 513 (1975); State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975); State v. Britt, 288 N.C. 699, 220 S.E.2d 283 (1975); State v. Smith, 290 N.C. 148, 226 S.E.2d 10 (1976); State v. Monk II, 291 N.C. 37, 229 S.E.2d 163 (1976); State v. Foddrell, 291 N.C. 546, 231 S.E.2d 618 (1977); State v. Squire, 292 N.C. 494, 234 S.E.2d 563 (1977); State v. Matthews, 295 N.C. 265, 245

With the exception of two cases which were tried prior to the decision in Witherspoon and involved exclusions based on general beliefs in opposition to the death penalty,[3] it has never vacated a death sentence as a result of Witherspoon.

There have been a series of cases involving jurors whose responses to the critical questions were, "I don't think so." In each of these cases, the defendant was granted no relief, although the court occasionally found that the jurors could not have been excluded under Witherspoon.

In State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974), the first of the cases, a prospective juror stated that he was against capital punishment and did not believe he could return a verdict that would result in a death sentence. The North Carolina Supreme Court held that this juror was properly excluded for cause with no explanation. The court merely stated that it was clear that the juror had already made up his mind. 284 N.C. at 687. In State v. Lampkins, 286 N.C. N.C. 459, 212 S.E.2d 142 (1975), the court followed Noell and found that the "I don't think so" responses were sufficient to exclude the jurors.

In State v. Monk I, 286 N.C. 509, 212 S.E.2d 125 (1975), 497, 212 S.E.2d 106 (1975), and State v. James Avery, 286 State v. Bernard, 288 N.C. 321, 218 S.E.2d 327 (1975), and State v. Johnson II, 298 N.C. 355, 259 S.E.2d 752 (1979),

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Footnote 2 concluded:

S.E.2d 727 (1978); State v. Barfield, 298 N.C. 306, 259 S.E.2d 510 (1979); State v. Johnson II, 298 N.C. 355, 259 S.E.2d 752 (1979); State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980); State v. Oliver and Moore, 302 N.C. 28, 274 S.E.2d 183 (1981); State v. Silhan, 302 N.C. 223, 275 S.E.2d 450 (1981); State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982); State v. Williams, ___ N.C. ___, 292 S.E.2d 243 (1982).

3 State v. Spence and Williams, 274 N.C. 536, 164 S.E.2d 593 (1968); State v. Ruth, 276 N.C. 36, 170 S.E.2d 897 (1969).

the court apparently reversed itself and found that the jurors' responses of "I don't think so" were not sufficient under Witherspoon to conclude that they were "irrevocably committed" before trial. However, in these cases, the court granted no relief since it held further that jurors of this sort had not been systematically excluded. Its reading of Witherspoon that the exclusion of jurors must be systematic rather than just one, so as to entitle the defendant to a new sentencing hearing, was, of course, ultimately decided by this Court to be incorrect in Davis v. Georgia, 429 U.S. 122 (1976).

The court's view of whether jurors who stated that they did not think they could return a death verdict changed a third time beginning with State v. Bernard Avery, 299 N.C. 126, 261 S.E.2d 803 (1980). Realizing that its holdings in State v. Monk I, supra, State v. Bernard, supra, and State v. Johnson II, supra, that Witherspoon violations would be harmless if not systematic, were in error,[4] it held that once a juror indicates that he or she does not know or does not believe or does not think or is just unsure that he or she could impose or recommend death, that juror is "irrevocably committed" to vote against the death penalty and therefore could be excluded for causes under Witherspoon.

It established this standard by interpreting this Court's holding in Witherspoon to apply solely to those jurors who merely express general objections to the death

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[4] Davis v. Georgia, supra, was decided by this Court in 1976. The North Carolina Supreme Court, however, as late as State v. Johnson II, supra, issued in 1979, continued to apply a standard requiring systematic exclusion. It was not until 1980 that the Court apparently realized that their systematic exclusion standard had been overruled by this Court.

penalty or merely express conscientious or religious scruples against infliction of the death penalty. If a juror expressed more than general objections to the death penalty, then, according to the North Carolina Supreme Court, that juror may be excluded without violating Witherspoon. The court did not acknowledge that this holding overruled Monk I, Bernard and Johnson II to the extent that they had determined that such jurors were not properly excludable.

In Bernard Avery, the court established its current standard by interpreting this Court's holding in Witherspoon to apply solely to those jurors who merely express general objections to the death penalty or merely express conscientious or religious scruples against infliction of the death penalty. If a juror expressed more than general objections to the death penalty, then, according to the North Carolina Supreme Court, that juror may be excluded without violating Witherspoon.

> In Witherspoon the United States Supreme Court held that veniremen may not be excluded from a jury on general objections to the death penalty or based on expressed conscientious or religious scruples against infliction of the death penalty. See also State v. Monk, 286 N.C. 509, 202 S.E.2d 125 (1975), second appeal, 291 N.C. 37, 229 S.E.2d 163 (1976).
>
> It is clear that jurors Averette and Curbeam expressed more than general objections to the imposition of the death penalty. Each affirmatively stated that he could not impose the death penalty regardless of the evidence presented. On this record the fact that their negative responses were phrased "I don't believe I would" and "I don't think so" does not equivocate their refusal to follow the law as given by the judge to such an extent as to make their challenge for cause improper. See State v. Noell, 284 N.C. 670, 685-86, 202 S.E.2d 750, 760-61 (1974).

Avery, 299 N.C. at 137.

The Avery standard was again applied to an "I don't think so" juror in this case, 292 S.E.2d at 213. Thus, in Avery and this case, "I don't think so" is a "negative

response" by the court's mere assertion and by its understanding of Witherspoon that anything less than an unmistakeable assurance that a juror would return the death penalty is grounds for removal.

Finally, in State v. Williams, ___ N.C. ___, 292 S.E.2d 243, 249-252, the Avery device for excluding jurors with reservations about the death penalty is extended and applied to a juror who simply "does not know" and "is not sure" that she could vote for death. Even these answers, we are told, are under Avery "negative responses."

For fifteen years the North Carolina Supreme Court, despite this Court's repeated decisions reaffirming Witherspoon, has consistently shown that it will somehow or by some means avoid the dictates of Witherspoon so that jurors who might be affected by the decision to impose death will be excluded from juries. As Justice Exum stated in his dissent in this case, 292 S.E.2d at 238-39, a juror who states that he or she does not believe or think he could impose death is merely stating that the death penalty would affect his or her decisions. Cf. Adams v. Texas, 448 U.S. 38 (1980). The juror is not stating unequivocally that under no circumstances could he or she recommend death. The standard now applied in North Carolina, as noted by Justice Exum, is in conflict with this Court's decisions in Witherspoon, Davis v. Georgia, supra, and Adams v. Texas, supra. It is likewise in conflict with a recent federal Court of Appeals decision. Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 1636 (1982). This Court ought to grant review of this case to resolve this conflict and explicitly hold that a juror who states she does not think she could impose death cannot be excluded for cause.

B. The "I'm life-prone juror."

In the Court below the defendant also claimed that the excusal for cause of juror Rogers was in violation of Witherspoon. As to his feelings concerning the death penalty, Mr. Rogers stated the following:

> Q. . . . [I]f you are selected as a member of this jury and assuming that the jury returns a verdict of murder in the first degree, guilty, and we get to the second phase, can you consider the imposition of both the death penalty as well as life imprisonment?
>
> A. That death penalty, I don't go for that too much.
>
> Q. Okay, let me go at it a different way. Do you have any religious, moral, ethical or any beliefs opposed to the imposition of the death penalty?
>
> A. Not really, except my own convictions.
>
> Q. I'm asking you now for your opinion and your convictions?
>
> A. I say I don't think much of the death penalty.
>
> Q. Okay. Let me go back and try it again. The law is that if the jury returns a verdict of first degree murder, and during a sentencing phase the State, me, establishes that there are aggravating circumstances as the Court will explain in his instructions as a matter of law as to what those are, then it is the jury's duty, sworn duty, to consider both. Now, after considering both you render the verdict that you and the other jurors deem appropriate, but your duty is to consider imposing both. Can you do that?
>
> A. I can consider, but as I say --
>
> Q. You tell me you would consider it but then you wouldn't do it, is that what you are saying?
>
> MR. HARRISON: Objection.
>
> A. (By witness) I said I would lean toward life imprisonment, if you want me to tell the truth about it, that's what I'm doing.
>
> Q. Yes, sir, I certainly do and I appreciate it and this is a difficult thing to ask.
>
> THE COURT: Let me ask him.
>
> MR. WANNAMAKER: Yes, sir.
>
> THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a

verdict which would result in the imposition of the death penalty?

MR. ROGERS: That is true.

Rpp. 67-68. See State v. Pinch, (Justice Exum's dissent), 292 S.E.2d at 240.

The above questions and answers were the entire voir dire of Mr. Rogers concerning his feelings about the death penalty.

The North Carolina Supreme Court, over the dissent of Justice Exum, simply held that based on the above examination:

> It is unmistakably clear that seven of the eight potential jurors [including Mr. Rogers] were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant.

Pinch, 292 S.E.2d at 213.

As Justice Exum noted in his dissent, 292 S.E.2d at 240, juror Rogers was likewise "unequivocally" or "categorically" opposed to the death penalty. The problem with the voir dire of Mr. Rogers, however, was not that his answers were equivocal, but that the questions asked were insufficient. The Witherspoon violation here was most aptly put by Justice Exum in his dissent.

> Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence that might be introduced at the trial. He said he could not impose it under any circumstances 'without hearing any evidence.' Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, and to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Rogers' position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one

way or the other without hearing some evidence. Rogers should not have been excused for cause.

Pinch, 292 S.E.2d at 240. (Emphasis in original).

This Court has made it clear that the meaning of voir dire colloquy is that which would be given it by the prospective juror rather than one trained in the law. "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood -- or misunderstood -- by prospective jurors." Witherspoon, 391 U.S. at 515-16, n. 9 (quoted with approval in Boulden v. Holden, 394 U.S. 478, 481-82 (1969); accord 292 S.E.2d 239 (dissenting Opinion of Exum, J.). Juror Rogers understood the court's question to mean merely that he had a predisposition to life sentences. That is, before he heard any evidence which might or might not change his mind, he would tend towards a life sentence. Juror Rogers was anything but "unequivocally" or "irrevocably" opposed to the death penalty. He was what a prospective juror and citizen may be expected to be, i.e., reluctant to impose a death sentence except in clear and extreme cases and even then only after the State has proven certain facts by its evidence. This Court ought to grant review to inform lower courts that the mandate of Witherspoon will be enforced. Jurors who express reluctance to impose death or who favor life before they hear the evidence cannot be excused for cause.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS SANCTIONED INCOMPLETE JURY CONSIDERATION OF MITIGATING CIRCUMSTANCES, IN CONFLICT WITH DECISIONS OF THIS COURT, BY ADOPTING RESTRICTIVE DEFINITIONS OF MITIGATING EVIDENCE AND DEFERRING TO THE VARYING JUDGMENTS OF TRIAL JUDGES ON RELEVENCE AND RELIABILITY OF PROFFERED MITIGATING EVIDENCE "UNLESS THE DEFENDANT DEMONSTRATES THE EXISTENCE OF PATENT, PREJUDICIAL ERROR."

The North Carolina Supreme Court made a series of rulings to sustain the trial court's limitations on the jury's consideration of critical mitigating evidence in ways wholly inconsistent with this Court's decisions in Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978); Green v. Georgia, 442 U.S. 95 (1979); and Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Accord, Enmund v. Florida, ___ U.S. ___, ___, 50 U.S.L.W. 5087, 5099-5101 (July 2, 1982) (Part III, dissenting Opinion, O'Connor, J).

The court below held: (1) that the petitioner's I.Q. of 66 could not be deemed to show he had a "relatively low mentality" to be considered by the jury as a mitigating circumstance, 292 S.E.2d at 222-24; (2) that material in letters from petitioner to his mother from the Guilford County Jail, containing "his apologies to his mother for not being a better son despite her good efforts and his rambling philosophical questions about why he had turned out to be so bad" was "plainly . . . not relevant to sentencing . . .," 292 S.E.2d at 220; (3) that a psychiatrist's opinion as to petitioner's blood alcohol level and the effect on him of consuming large quantities of beer prior to his offense was "unreliable and lacked probative value" where it was based on something less than "a reasonable degree of medical certainty," 292 S.E.2d at 220, and where the court had denied petitioner's request that the psychiatrist be permitted to interview State's witnesses so that he could form a more certain opinion, 292 S.E.2d at 214-215; (4) that the trial court did not err in sustaining the District Attorney's objections that questions of petitioner and a friend as to petitioner's remorse for the killings were irrelevant, Rpp. 279-80, on the ground that the evidence was repetitious since some evidence was received to this effect,

292 S.E.2d at 219; and (5) that trial court error in excluding mitigating material is harmelss "unless the [petitioner] demonstrates the existence of patent, prejudicial error," 292 S.E.2d at 219.

Review by this Court of these several holdings below is warranted to avoid the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605; Eddings, 71 L.Ed.2d at 13-14 (O'Connor, J. concurring). They effect not only the lawfulness of petitioner's death sentences, but also others whose penalty trials are to be judged under those rules of admissibility and judicial review.

(1) Mental Development. Petitioner was 19 years old at the time of his crimes. He had a ninth grade education. His parents divorced when he was a child. He admired his father, who rejected him. He lived with his mother, in Connecticut, who was forced to work at two jobs until sometime after she remarried. She sent him to live with his father after she discovered her second husband was bisexual. He stayed only briefly with his father, in California, and then only briefly with his mother. He was unsuccessful in school and essentially on his own from about age 13.

He ended up in Greensboro, North Carolina, where his brother lived, a year or so before the killings. He took up with a motocycle gang, seeking the familial support which he had been lacking in his life.

At trial, a psychiatrist testified that he had a I.Q. of 66 and that he thought petitioner's intelligence fell into the "low-normal range." 292 S.E.2d at 224. Petitioner requested at trial that on the list provided the jury of potentially mitigating circumstances be included his "relatively low mentality," a request which was denied. In

North Carolina, juries are instructed, upon timely request, to consider as mitigating circumstances not only those as listed in the statute, N.C. Gen. Stat. §15A-2000(f), which are raised by the evidence, but also those requested and not listed in the statute. State v. Johnson I, 298 N.C. 47, 257 S.E.2d 597 (1979). Such non-statutory mitigating circumstances are also included on a written list provided to the jury "so that they will stand on an equal footing before the jury," with those statutorily listed. Johnson I, 257 S.E.2d at 617.

The majority below acknowledged petitioner's entitlement to the submission to the jury of a mitigating circumstance regarding his mental development. 292 S.E.2d at 224. It, however, thought his specific request, that he had a "relatively low mentality," was not supported by the psychiatrist's testimony. Ibid. Justice Exum dissented, believing that "the phrase 'relatively low mentality' accords precisely with the evidence which was introduced," 292 S.E.2d at 241, and that he was entitled, under the Eighth Amendment, to have the jury consider his "relatively low mentality." 292 S.E.2d at 240-41.

The majority also said any error in the failure to submit this circumstance to the jury was harmless. It held that in this context, "defendant [must] demonstrate . . . affirmatively . . . (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant." 292 S.E.2d at 223-24.[5] Again, Justice Exum

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5 Its harmless error test for exclusion of mitigating evidence was similar. "[W]e believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error." 292 S.E.2d at 219.

disagreed, concluding that the error is plainly of a constitutional dimension since it has to do with the "mental . . . development," Eddings, supra. 102 S.Ct. at 877, 71 L.Ed.2d at 12, of a 19 year old defendant. Since this factor should be put to the jury on "equal footing" with other mitigating factors, it was error requiring a new trial. Id. at 241-42.

Review should, therefore, be granted to determine whether the decision below squares with the requirement of Lockett that all mitigating evidence be given full consideration by the sentencing jury and whether it is consistent with this Court's decisions requiring proper appellate review to avoid the risk of the infliction of death penalties where another penalty might have been warranted.

2. The Positive Qualities of Petitioner's Family Relationships.

Possibly the best evidence available to petitioner's court appointed counsel in their efforts to persuade the jury to spare his life, notwithstanding his terrible senseless crimes and an apparently aimless life centering on drugs, alcohol and motocycles, was a series of letters he wrote to his mother from the Guilford County Jail as he awaited trial. Appendix D8-D11.

The jury heard evidence of the inadequacy of petitioner's family background, his father's abandonment and rejection of him, his mother's inability to give him time and attention because of her need to work, his difficulties with his bisexual step-father and his being essentially set adrift at an early age. What it did not hear was the positive and wholesome relationship which had developed with his mother after his arrest. In his letters, he poured his heart out to her, expressing his love and devotion to her and his brother and sisters, his painful recognition of how

wrong he had been in rejecting her wholesome guidance, which had been accepted by her other children, his recognition of and remorse for the injury his life and terrible acts had caused her and the rest of the family, and his efforts to comfort her and his sisters. It was in these documents that a jury might find that whatever else he had been and done, he was a 19 year old boy possessed of human qualities valued by them.

The court below found this evidence irrelevant.

> Moreover, these two letters included much material which plainly was not relevant, i.e., his apologies to his mother for not having been a better son despite her good efforts and his rambling philosophical questions about why he had turned out to be so bad.

292 S.E.2d at 220.

The underscored portions of those two letters[6], set out below, are what the court determined to be irrelevant.

> 2/14/80
>
> Mom,
>
> I just received all the things you & lyn got me and I want you to know that I really appreciate it, I couln't ask for anything more. When I left the visiting room today I was the happyest man in the world, I almost cried.
>
> Ya know I really thought that after the way I acted when you let me come live with you in Memphis, you had figured just like Dad, That there was no way I would change or ever do anything for myself. I really realize how how I should have listened to you as a child and I'm sure it would have made me a better man than I am today. But Mom I truthfully belive its the old man's blood in me that took me down all these roads I've been down.
>
> (over)
>
> Now I think of how you worked so hard to bring all of us up the right way, and how I made no effort to make you proud of me, and I appologize for that with all my heart.
>
> I promise you Mom that one day I'm going to be somebody for you, the rest of the family and for myself.
>
> Ya know Mom I'm glad I wasn't around the house much these past years because I wouldn't of wanted Jennifer to dislike me. She really doen't know how her Big

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6 Substantial portions of two other letters were also kept from the jury. The portions of one are set out at Appendix D10-D11.

Brother was and I never want her to know because it would hurt her like it has hurt ya all.

Tell her I love her more than ever and one day I come see her. I don't know if you should Bring her to the penatenary, Maybe when she's older.

Tell Jenny that I'm praying for her every nite.

(2)

Excuse my penmenship, but ya know its kind of hard writing in the dark.

Im trying to get a light in my cell, Im sure Ill get one soon.

I hope to learn a trade in prison that will help me find work when I get out, if nothing else Ill know enough about the law to help other people.

Well, Moma Im going to go to sleep its late, bye the way I hope you and linda weren't out walking this late Because they delivered the stuff you all got me around 10:00 p.m.

I love you Mom, and I hope you you had a safe trip home.

"God Bless"
Mike

Defendant's Exhibit 1.

Appendix D9.

. . . . .

2/16/80

Mother

Hey Mom how are you doing? I thought Id write you and tell you the latest.

They moved me to another cell and its got a light in it.

Its also a little bit cleaner, Im pretty happy with it.

I wanted to write you again and tell you that your the best Mother anyone could ever have.

I've been doing alot of thinking and its a shame the way Ive treated you when you were trying to bring me up the right way.

I could say I'm sorry all day long but thats not going to help the hurt Im feeling now.

I think back when I was young and how hard you worked just so we could get by, and I havent done a thing but cause alot of hurt. (over)

Moma I know it hurt you bad when you found out what I was in jail for.

You dont need any more hurt, you've lived such a hard life with alot of hurt, and I realize now how much you have hurt.

I hope you forgive me for what Ive put you through.

Moma I want to prove to you so bad that I can be somebody its killing me, I swear it is, Im just praying to god I get out of prison before you get old and die on me.

I pray to god you life a long life Moma. You have to because Ive done you so wrong.

You look real heathy and beautiful now but if I get 50 years or life ill never get my chance.

Moma why couldn't I have been a good kid like linda and Bill and even Jenny, every kid you've ever had listened and did right except me.

Why is that I dont understand we came from the same Mom and I've come out from underneath the same roof and I had to be a [expletive omitted]. Why? Was that my choice or am I just mentally disturbed, you know I really wonder.

Moma I'm hurtin and I need you to answer these questions for me, please tell me what wrong with me.

I going to bed now and I will pray for you all,

I love you

Mike

P.S. I love you too Jenny.

Defendant's Exhibit 2.

Appendix D10.

. . . . .

There was nothing before the jury which otherwise[7] revealed to the jury the human qualitied he reflected by these letters.

Petitioner submits that what the court below has ruled irrelevant is precisely the sort of information which he is entitled, as a constitutional matter, to have the sentencing jury consider. The Court should grant certiorari to

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7 Of the five letters offered, all that was admitted was:

(1) An excerpt from Exhibit 3:

> It hurts me to know I could take a person's life, and it would probably hurt much more a I grow older; but it's done, and I'm living for the future now.

(2) An excerpt from Exhibit 4:

> Everything here is all right, and I slowly but surely, cleaning up my act; and it is really helping me out as far as getting along with people.

(3) Exhibit 5 and a "poem":

> 'Mom, I'm not feeling very well. I feel weak and have been laying down a lot; so I don't feel very much like writing, but here is a poem I wrote you all. I had a friend rewrite it because he's got a good handwriting. I hope you like it. It took me a while to finish it. I love you. Michael.'

The poem reads as follows:

consider whether this evidence which reveals petitioner's individual "uniqueness," Eddings, 71 L.Ed.2d at 8, through his love and concern for his mother, involves "the characteristics of the person who committed the crime," Gregg v. Georgia, 428 U.S. at 197, his "character," Woodson, 428 U.S. 280, 304, or his "family background, and personal history," Eddings v. Oklahoma, 71 L.Ed.2d at 12 (concurring Opinion of O'Connor, J.) so that its exclusion at trial would render his sentence violative of the Eighth Amendment.

3. Petitioner's Mens Rea. Dr. Sherrow, a psychiatric expert on alcohol and drug abuse, had examined petitioner for the purpose of providing his opinion of the effect of petitioner's drinking on him at the time of the crimes. The trial court had authorized up to $1,500 for his fee. Dr. Sherrow examined petitioner. He wanted independent evidence regarding the extent of petitioner's drinking and behavior

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Footnote 7 concluded:

> 'For my family. In the past when I was just -- it was just life and me, I often wondered if my family really cared of me; in that day and age I was evil and unkind, always had violence, drugs, and women on my mind. Now I have matured and love my family very much. After all the hurt I've caused, it's their heart I hope I've touched. My mother is beautiful. My brother and sisters are wise, and I hope to be with them one day hight up in the sky. So when that day of judgment comes to me and I'm up on my knees, I hope by then I fulfill my part in life and society. Now if I'm refused and sent to the depths of hell, I will lift my head and say to myself, "Michael, it's god's will." As I sit in my cell and pray and pray to seek god eveary night, it seems that I -- (unintelligible -- the witness is emotional)
>
> I would like to say to my family as I close my poem, no matter what happens, my love will always be with you as it is tonight. Michael.' Rpp. 296-299.

The portions of Exhibit 4, not put before the jury, are reproduced at Appendix D10-D11.

on the day of the crimes so that he could develop his opinion. Accordingly, petitioner moved the court for an order directing the State to make available six or so witnesses who had been with petitioner on the day and night of the crimes. Rpp. 51-52; 45-47. The order denying the request was affirmed on appeal. 292 S.E.2d at 214-215.

At trial, Dr. Sherrow was not able to express an opinion as to petitioner's blood alcohol level or the effect on him of his alcoholic consumption to a "reasonable degree of medical certainty," Rp. 294, because he had not been able "to talk to the eyewitnesses at the time of these events." Rp. 293. He defined "a reasonable degree of medical certainty being that none out of ten doctors in a similar situation as myself would, having viewed the facts as I have reviewed them, come up with the same opinion." Rp. 294. The doctor did have an opinion on these questions, but because he had not had access to the other data it was less certain than the standard he described. Rpp. 294-297.

The trial court, upon the State's objection, refused to allow Dr. Sherrow to give his opinions to the jury because it did not rise to the level of a "medical degree of certainty."

> A. Yes, I have an opinion. I cannot hold it to a reasonable degree of medical certainty --
>
> MR. WANNAMAKER: Well, objection.
>
> THE COURT: Objection sustained.

The North Carolina Supreme Court agreed that evidence on petitioner's "blood alcohol levels at the time of the shootings . . . would have been relevant." 292 S.E.2d at 220. "[H]owever, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of

medical certainty, the evidence was unreliable and lacked probative value." Ibid.[8]

The question which emerges here is, in the context of these facts, whether the rigorous application of a state court rule of evidence may be invoked to prevent a psychiatrist from giving important evidence concerning petitioner's mens rea, a factor of paramount importance in any capital sentencing decision, Enmund v. Florida, ___ U.S. ___, ___, 50 U.S.L.W. 5087, 5092 (July 2, 1982); Enmund at 5099-5100 (Part III, dissenting Opinion of O'Connor, J.); Lockett v. Ohio, supra, at 616 (concurring Opinion of Blackmun, J.). The Court has held that state evidentiary rules must gave way in a capital sentencing hearing where the evidence is relevant to the sentencing decision and has sufficient indicia of reliability. Green v. Georgia, 442 U.S. 95 (1979) (per curiam). See, also, Witherspoon v. Illinois, 391 U.S. 510, 522 n. 20 (1968) ("Insofar as a determination that a man should be put to death might require 'that there be taken into account the circumstances of the offense together with the character and propensities of the offender,' Pennsylvania v. Ashe, 302 U.S. 51, for example, it may be appropriate that certain rules of evidence with respect to penalty should differ from the corresponding evidentiary rules with respect to guilt. See, e.g., Williams v. New York, 337 U.S. 241.") (Emphasis added.) The Court should grant certiorari to consider whether the wooden invocation of an evidentiary rule, without analysis of its necessity or the reasons why it could not be met comports with petitioner's right, under the

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8 The court also sustained the exclusion of testimony from Olivey regarding specific instances both before and after the crime of petitioner's drug and alcohol abuse. 292 S.E.2d at 220.

Eighth Amendment, not to be executed except after fair consideration by the jury of all matters which may have mitigating effect.

(4) Petitioner's Remorse For His Crimes. At trial, evidence was produced that after arrest petitioner expressed remorse for Ausley's death but not for the death of Pachaco. When he testified, he acknowledged making those statements. His lawyer questioned him about this:

> Q. Michael, how do you feel about that now?
>
> A. I regret it.
>
> MR. WANNAMAKER [Assistant District Attorney]: Object to how he feels about it now, your Honor please. It is irrelevant.
>
> THE COURT: Objection sustained.

Rp. 278. His friend, Sherry Olivey, who had visited with him in jail, was asked what he had told her about his feelings.

> Q. What statements, if any, has he made to you about his feelings about what happened on October 18, 1979?
>
> MR. WANNAMAKER: Objection.
>
> THE COURT: Sustained.

Rp. 288; Appendix D6.

The North Carolina Supreme Court held that neither of these rulings were significant since as to petitioner, his feelings as to remorse eventually got before the jury, 292 S.E.2d at 219, and as to Olivey, her testimony was repetitious of testimony given by petitioner's mother and sister. Ibid. It also noted that Dr. Royal had testified that petitioner had expressed to him regrets for killing Ausley.[9] Ibid.

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9 Of course the principal point here was petitioner's efforts to contend with his admitted earlier statements that he lacked remorse for Pachaco's death, which had also been repeated to Dr. Royal. Rp. 285.

It is true that evidence of petitioner's regret was before the jury. However, since the prosecutor in his argument at the guilt phase, Rp. 249, and in his concluding argument seeking petitioner's death insisted that petitioner should be convicted of first degree murder and executed because "[h]e's not sorry he killed; he's glad," Rp. 310, one would think that he should have been entitled to offer all the evidence that he had to refute the State's claim. Instead, the holding below is he, himself, cannot directly answer this charge, nor can his witness Olivey, because others have given such testimony.

There may have been greater harm to petitioner's case in the trial court's rulings than in the exclusion of the testimony. When the judge sustained the State's objection to the question about his present feelings on the ground that "how he feels about now . . . is irrelevant," Rp. 278, and made a similar ruling when the question was put to Olivey, Rp. 288, the jury was being told that his present feelings did not matter. The fact that some evidence of this sort did come in did not dispell the message from the judge that the evidence had little value.

Petitioner suggests that these rulings below again reflect an impermissibly narrow view of a defendant's rights to present mitigating evidence and that this Court should review them.

(5) Harmless Error. All of these holdings sustaining limitations on petitioner's efforts to show mitigation are informed by harmless error rules which promise only cursory appellate review and which tell trial judges that they may severely restrict defendants' presentation of mitigating evidence without fear of reversal.

The North Carolina Statute provides that "evidence may be presented as to any matter that the court deems relevant to sentence . . .. Any evidence which the court deems to have probative value may be received." N.C. Gen. Stat. §15A-2000(a)(3). The statute also seems to require careful appellate review. N.C. Gen. Stat. §15A-2000(d). It might have been expected that the court would exercise its review function under (d) supra to interpret (a)(3), supra, to insist that the capitally tried would be given appropriate latitude to present to the jury anything which might have mitigating value. Instead, the decision below demonstrates that the court reads (a)(3) to mean that the trial court's judgment as to what it "deems relevant" and what it "deems to have probative value" is nearly unreviewable.

> [T]he ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation. [citations omitted]. Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error.[10]

292 S.E.2d at 219.

Accordingly, review here would necessarily resolve, in addition to the particular holdings complained of above, at least three important and related issues: (a) whether a capital sentencing statute, as construed, which leaves to the trial judge's nearly unreviewable discretion the admissibility of mitigating evidence in sufficiently

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10 As noted above, see text at footnote 5, the court also fashioned a similar harmless error test for failing to instruct on a mitigating circumstance. "[A] defendant demonstrates reversible error . . . in a capital case only if he affirmatively establishes . . . that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant." Id. at 223-24.

"consistent and principled," Eddings, 71 L.Ed. 1, 8; (b) whether the North Carolina harmless error tests conflict with this Court's decisions that where error is of a constitutional dimension the burden is on the State to establish that it is harmless beyond a reasonable doubt, e.g., Chapman v. California, 386 U.S. 18 (1967); accord, 292 S.E.2d at 241 (dissenting Opinion of Exum, J.) and with this Court's death penalty cases requiring "that the prisoner sentenced to death is afforded process that will guarantee, as much as is humanly possibly, that the sentence was not imposed out of whim, passion, prejudice, or mistake," Eddings, 71 L.Ed2d at 13 (concurring Opinion of O'Connor, J.); and (c) whether the North Carolina court's harmless error tests render unconstitutional its death penalty statute by removing the "safeguard of meaningful appellate review."[11] Gregg v. Georgia, 428 U.S. at 195; Proffitt v. Florida, 428 U.S. 242, 253 (1976).

The Court should grant certiorari to give guidance to the states as to their consitutional obligations in death penalty cases to insure consideration of mitigating factors and to provide meaningful appellate review.

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11 The apparent promise in the statute of meaningful appellate review is also unkept in another respect. It directs the state supreme court to overturn death sentences which are "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C. Gen. Stat. §15A-2000(d)(2). The court has not found any death sentence to be disproportionate. In its first seven affirmances of death peanlties, including petitioner's, the court described its function as determining whether the penalty was "excessive or disproportionate . . . considering both the crime and the defendant without reference "to the penalty imposed in similar cases." State v. Harfield, 298 N.C. 306, 259 S.E.2d 510 (1979), cert. denied, 448 U.S. 907 (1980); State v. McDowell, 301 N.C. 279, 271 S.E.2d 286 (1980), cert. denied, 450 U.S. 1025 (1981); State v. Martin, 303 N.C. 246, 278 S.E.2d 214, cert. denied, ___ U.S. ___, 70 L.Ed.2d 240 (1981); State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981); State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981), cert. denied, ___ U.S. ___, 72 L.Ed.2d 155 (1982); State v. Taylor, 304 N.C.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE NORTH CAROLINA SUPREME COURT HAS MISAPPREHENDED THE MEANING OF FURMAN V. GEORGIA, 408 U.S. 238, BY HOLDING THAT A CONSTRUCTION OF ITS DEATH PENALTY STATUTE WHICH WOULD PERMIT A JURY TO RENDER A LIFE VERDICT IF IT MADE THREE SEPARATE FINDINGS REGARDING AGGRAVATING CIRCUMSTANCES WOULD CONSTITUTE UNCONSTITUTIONAL UNBRIDLED DISCRETION.

The majority of the court below construed North Carolina's post-Woodson[12] death penalty statute, N.C. Gen. Stat. § 15A-2000 et seq. (1977), Appendix C, infra, to require - instead of permit - a capital verdict upon certain specific jury findings. 292 S.E.2d at 226-27. Petitioner's jury had been instructed that "it had a duty to recommend a sentence of death if it found three things[13] . . .." 292

Footnote 11 concluded:

249, 283 S.E.2d 761 (1981); State v. Pinch, ___ N.C. ___, 292 S.E.2d 203 (1982). In the first of these cases, the court characterized §2000(d)(2) as providing it "statutory discretion." Barfield, 259 S.E.2d at 544.

In petitioner's case, the dissenter thought it was time that the court advise the bar "the manner in which it conducts its review." 292 S.E.2d at 242. He, joined by two others, 292 S.E.2d at 229-30, believed the court should compare each death penalty with cases which have been reviewed by the court "whether the jury recommended death or life imprisonment." Ibid. In two affirmances since petitioner's, some passing reference has been given to other affirmed death penalty cases. State v. Williams, ___ N.C. ___, 292 S.E.2d 243, 263-64 (1982) (citing all affirmed death cases), and State v. Smith, ___ N.C. ___, 292 S.E.2d 264, 276-77 (1982) (citing two affirmed death cases). Later, in State v. Brown, ___ N.C. ___, 293 S.E.2d 569 (1982), the court noted that it has not said what group of cases it looks to for its comparisons, 293 S.E.2d at 590, and proceeded "to conclude that the sentence is not disproportionate or excessive considering both the crime and the defendant" without reference to any other case. 293 S.E.2d at 591.

Thus, the North Carolina Supreme Court has now affirmed ten death sentences without any semblance of proportionate review even to other death penalty verdicts. The only attempt at such review was in one case, by a dissenting Justice. State v. Rook, supra, 283 S.E.2d 758-61.

12 Woodson v. North Carolina, 428 U.S. 280 (1976).

13 The three required findings were:
"(1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the

S.E.2d at 227. (Emphasis in original). Petitioner argued that these instructions violated the statute.[14] He

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Footnote 13 concluded:

death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt." 292 S.E.2d at 227. See N.C. Gen. Stat. § 15A-2000(c)(1), (2) and (3) quoted in footnote 14, infra.

14 The relevent portions of the statute are:

(b) Sentence recommendation by the Jury.--- Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (3) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (3) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death.--- When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

contended that the three jury findings are necessary, but insufficient, to support a death verdict; that the statute required that the jury still make the final ultimate choice, whether petitioner should be sentenced to die or to life imprisonment; and that therefore the crucial issue in his case had been withdrawn from his jury by the judge's charge.

The North Carolina Supreme Court rejected petitioner's argument based on its belief that otherwise the jury would be permitted "to exercise unbridled discretion . . .," 292 S.E.2d at 227, prohibited by Furman v. Georgia, 408 U.S. 238 (1972).

Justice Exum, in dissent on this point, put the issue clearly:

> I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a bare-bones anaylsis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury must return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the

---

Footnote 14 concluded:

> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

N.C. Gen. Stat. §15A-2000(b) and (c).

majority's discussion,[15] have made it abundantly clear that the majority's interpretation is not constitutionally required. (Emphasis in orignal).

292 S.E.2d at 230. Justice Exum, finding no barrier in this Court's death penalty decisions to the construction of the statute urged by petitioner, proceeded "'to ascertain the intent of the legislature,'" 292 S.E.2d at 230, and concluded that the jury members should be "told that if they answer the crucial issues affirmatively and unanimously, 'you may, although you need not, recommend that the defendant be sentenced to death,'" 292 S.E.2d at 236, an instruction which had been "recommended by the Superior Court Judges Pattern Jury Instruction Committee in May 1979," ibid, but which was replaced in May 1980 after State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), by the language used by the judge at petitioner's trial.

Since the North Carolina court has interpreted its statute "as it did because it felt under compulsion of federal law as enunciated by this court . . .," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. 1, 5 (1950), a federal question is presented for review. Ibid. State courts are, of course, free to interpret their statutes "solely as a matter of [local] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977). However, when a "reading of a whole opinion shows [that the state court

---

15 The statement that none of this Court's decisions are "mentioned in the majority's decision" may be somewhat misleading. The majority had said that "defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979) . . ." and then quoted from Goodman including the following:

> The exercise of such unbridled discretion by the jury under the court's instructions would be contrary to the rules of Furman and the cases which have followed it. Id. at 35, 257 S.E.2d at 590.

292 S.E.2d at 227. Thus, the court's holding in this case was specifically grounded -- albeit within a quote -- upon its interpretation of this Court's Eighth Amendment decisions.

ruled] not as a matter of statutory construction, but because it thought the Federal Constitution required such action," Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 120 (1924), then a federal question is presented for review by this Court. State Tax Commission v. Van Cott, 306 U.S. 511, 514 (1939). Moreover, a federal question is also presented if the State court decision rests upon both state and federal law but "these two grounds are so interwoven that [this Court is] unable to conclude that the judgment rests upon an independent interpretation of the State law." Ibid. Furthermore, a federal question remains when "doubt" exists as to whether the State court "did not deem itself bound" by the federal considerations, Missouri ex rel. Southern R. Co. v. Mayfield, supra, or where the decision "might have been decided differently if the court below had felt free, under [this Court's] decisions, to do so." Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 443 (1951); United Air Lines v. Mahin, 410 U.S. 623, 632 (1973). See, also Delaware v. Prouse, 440 U.S. 648, 653 (1979).

There is no doubt here that the North Carolina Supreme Court adopted a construction of its statute as it did because it "deem[ed] itself bound," Missouri ex rel. Southern R. Co. v. Mayfield, 340 U.S. at 4, by "'the rules of Furman [v. Georgia, 408 U.S. 238] and the cases which have followed it.'" 292 S.E.2d at 227.

It was expected by the litigants below that this "extremely important new question dealing with the construction of our death penalty statute," 292 S.E.2d at 230 (Exum, J. dissenting), would be controlled by the court's interpretation of Furman. The issue originated from language in the court's decision in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). There the jury had been instructed that if it

answered the three statutorily required "issues affirmatively and unanimously, it 'may then recommend the death penalty.' (R. at 185)." 292 S.E.2d at 233 (Exum, J. dissenting). (Emphasis in original). It had not been instructed, as was petitioner's jury, that after making those findings it was then duty bound to recommend death. Goodman argued on appeal that there should have been further instructions that the jury, "'had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances.' Brief for Defendant Appellant at 15-16." Ibid. The court rejected that argument specifically relying upon its understanding of Furman. The Court held that to adopt Goodman's proposed instructions,

> would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.

298 N.C. at 35, 257 S.E.2d at 590.

As noted above, prior to Goodman, the North Carolina Pattern Jury Instructions promulgated by a committee of the Conference of Superior Court Judges had advised trial judges to instruct the jury that it "'may although it need not, recommend that the defendant be sentence to death,'" 292 S.E.2d at 232 (Exum, J. dissenting), upon making the statutory findings. Such instructions "or a variation of them" were given "in a large number of death penalty cases."[16] In some case, where jurors were so instructed, defendants received life sentences notwithstanding affirmative answers to the three issues. Id. at 234 n.4.

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16 Many such cases are listed at 292 S.E.2d at 232 n.3 (Exum, J. dissenting).

In reliance upon Goodman, the Pattern Jury Instructions were changed in May 1980 to impose a "duty to recommend that the defendant be sentenced to death," id. at 233, if the necessary findings were made in favor of the State.

In the North Carolina Supreme Court, petitioner not only advanced arguments in support of his contention that the General Assembly had intended that jurors be permitted to recommend life imprisonment notwithstanding findings of aggravating circumstances sufficient to call for the imposition of the death penalty which outweighed mitigating circumstances; he also sought to respond to the concerns expressed by the court in Goodman that such a construction might run afoul of the prohibitions against unbridled jury discretion.

The State, in its brief, chose to ignore all of petitioner's traditional arguments regarding legislative intent. The court had previously canvassed the legal and legislative history of the 1976 enactment and concluded that the General Assembly had, even more than the legislators of Georgia and Florida, borrowed extensively from the Model Penal Code (MPC). State v. Johnson I, 298 N.C. 47, 56-63, 257 S.E.2d 597, 606-610 (1979).

> The North Carolina statute follows both in broad outline and in detail the MPC even more closely than did the statutes of Georgia and Florida. This is appropriate inasmuch as the concerns to which the MPC was addressed were the same as those considered controlling in the leading opinions of the United States Supreme Court in the cases discussed above.

298 N.C. at 62-63. Petitioner, therefore, argued that since under the models for the North Carolina statute, which had been approved by this Court, juries are free to recommend life regardless of any subsidiary findings, see Proffitt v. Florida, 428 U.S. 242, 248; Gregg v. Georgia, 428 U.S. 153, 165-166, 207; MPC, Section 210.6(2), such a construction of

the North Carolina statute was intended by the General Assembly. The State's brief had no answer to these arguments.

The total thrust of the State's brief was that petitioner's construction would be unconstitutional. Brief for the State, pp. 67-72. "If the jury were allowed to make the further decision requested by the defendant, the jury would be allowed to engage in the very type of unbridled discretion which Furman simply does not allow." Id. at 72.

The State prevailed below on exactly the ground it had advanced. The majority held that petitioner's construction would result in "unbridled" jury discretion allowing the jury "arbitrarily or capriciously [to] impose or reject a sentence of death." 292 S.E.2d at 227 (emphasis in original). The opinion on this point concluded with the quotation from Goodman that "'The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman and the cases which have followed it.'"[17] Ibid.

---

17 The Court's full treatment of petitioner's assignment of error was as follows:

> Both the prosecutor and the trial court advised the jury that it had a duty to recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumsances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the stautory directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]
>
> Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudically withdrew from the jury its final option . . . to recommend a life sentence nothwithstandng its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

A reading of the "opinion as a whole," State Tax Commission v. Van Cott, supra, shows that the "majority construe[d] the statute in this way on the sole ground that otherwise the statute would be subject to constitutional attack that a jury could decide between life and death in its unbridled discretion." 292 S.E.2d at 230 (Exum, J. dissenting). At the very least, "[g]iving the opinion of the Supreme Court of [North Carolina] a scope most favorable to reliance on a non-federal ground, doubt still remains

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Footnote 17 concluded:

> The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously impose or reject a sentence of death. Instead, the jury may only exercise guided discretion in making the underlying findings required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." State v. Johnson [I], 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); see State v. Barfield, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979), cert. denied, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). Moreover, defendant's contention was implicitly answered in State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in Goodman, explained that:
>
> > [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of Furman [v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it.
>
> Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17] (Emphases in original; footnotes omitted).

whether that court did not deem itself bound [to rule as it did] by its view of the demands of [this Court's] decisions . . .." Missouri ex rel. Southern R. Co. v. Mayfield, supra. Accordingly, an important federal question emerges. Moreover, "[t]he possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." United Air Lines v. Mahin, 410 U.S. 623, 630-31 (1973).

The federal question presented is a critical one for which state courts and legislatures "deserve the clearest guidance that the Court can provide." Lockett v. Ohio, 438 U.S. 586, 602 (1978). It is whether a state procedure which requires, for any capital jury verdict three separate findings regarding statutorily defined aggravating circumtances, but would leave to the jury finally "to dispense mercy on the basis of factors too intangible to write into a statute . . .," Gregg v. Georgia 428 U.S. 153, 222 (Opinion of White, J.), is "consistent and principled but also humane and sensible as to uniqueness of the individual," Eddings v. Oklahoma, ___ U.S. ___, ___, 102 S.Ct. 869, 874, 71 L.Ed.2d, 1, 8 (1982), or allows unbridled discretion condemned by Furman.

Petitioner had thought that it was clear that the extent of jury discretion which would remain if the North Carolina statute were construed as he contended the legislature intended would not be "capricious" in a constitutional sense under Furman, but instead would be "guided" as required by Gregg. That seemed to him to be the holding of Gregg. See, 428 U.S. at 199, 203 (prevailing Opinion); id. at 199 (Opinion of White, J. joined by the Chief Justice and

Rehnquist, J.). Whatever the holding of Gregg, the division of the court below demonstrates that "confusion," Lockett, 438 U.S. at 599, persists as to what satisfies both Eighth Amendment procedural commands "of measured consistent application and fairness to the accused." Eddings v. Oklahoma, ___ U.S. ___, at 102 S.Ct. at 847, 71 L.Ed.2d at 8 (1982).

If the majority below is correct, then this Court should so declare since, as pointed out by Justice Exum, statutes previously before this Court from other States would almost certainly be unconstitutional under Furman. 292 S.E.2d at 234-36. If, on the other hand, Justice Exum's conclusion that "the majority's interpretation is not constitutionally required," 292 S.E.2d at 230, then this Court "should so declare, leaving the State court free to decide the . . . issue solely as a matter of [North Carolina] law." Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 568 (1977); see, also, Delaware v. Prouse, supra; United Air Lines v. Mahin, supra; Perkins v. Benguet Consol. Mining Co., supra; Missouri ex rel. Southern R. Co. v. Mayfield, supra; State Tax Commission v. Van Cott, supra; Red Cross v. Atlantic Fruit Co., supra.

If the decision below remains uncorrected, capital defendants will face trial in North Carolina under a considerably more mandatory statute than the General Assembly may have intended. Moreover, the decision below stands as a bar to any revision of the statute to permit a greater measure of jury discretion as long as the General Assembly desires to maintain a constitutional statute. See, Woodson, 428 U.S. at 300. Accordingly, this Court should grant certiorari in order to "remand the case to avoid the risk of 'an affirmance of a decision which might have been decided differently if the court below had felt free, under [this

Court's] decisions, to do so.' Perkins v. Benguet Consol. Mining Co., 342 U.S. at 443." United Air Lines v. Mahin, 410 U.S. at 632.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Dated: August 31, 1982.

Respectfully submitted,

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Ann Petersen
Assistant Appellate Defender

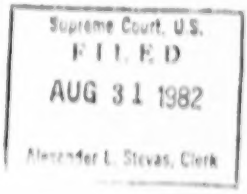
ATTORNEYS FOR PETITIONER

NO. 82 - 5353

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982



MICHAEL EDWARD PINCH

Petitioner

-v.-

STATE OF NORTH CAROLINA

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Michael Edward Pinch, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of North Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Petitioner's affidavit in support of this motion is attached hereto.

Adam Stein
Appellate Defender
Office of the Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602
(919) 733-9490

ATTORNEY FOR PETITIONER

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NO. 82 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL EDWARD PINCH

Petitioner

-v.-

STATE OF NORTH CAROLINA

I, Michael Edward Pinch, being duly sworn, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am incarcerated and receive no income from earnings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration from me. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows:

I was convicted in the Superior Court of Guilford County, a trial court of the State of North Carolina, of two counts of murder, and was sentenced to death in both cases. I am being held at Central Prison in Raleigh, North Carolina. I believe that errors were committed during the course of my trial in violation of my constitutional rights

and that my convictions and death sentences were imposed upon me in violation of my constitutional rights.

MICHAEL EDWARD FINCH

NORTH CAROLINA

WAKE COUNTY

The foregoing Affidavit of Michael Edward Finch was subscribed and sworn to before me this 24th day of August, 1982.

NOTARY PUBLIC

My Commission Expires

DARLENE I. ALFORD NOTARY PUBLIC WAKE COUNTY, N.C. My Commission Expires August 9, 1986

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Supreme Court, U.S.
FILED
AUG 31 1982
Alexander L. Stevas, Clerk

No. 82 -5353

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MICHAEL EDWARD PINCH,

Petitioner,

-against-

STATE OF NORTH CAROLINA

PETITIONER PINCH'S APPENDICES

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APPENDIX A

Opinion of the Supreme Court of North Carolina,
rendered June 2, 1982

STATE of North Carolina

v.

Michael Edward PINCH.

No. 43A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Guilford County, Hal Hammer Walker, J., of first-degree murder and was sentenced to death. Defendant appealed. The Supreme Court, Copeland, J., held that: (1) both guilt and sentencing phases of defendant's trial were competently conducted without accompaniment of constitutional defect or prejudicial error; (2) judgments of death were lawfully imposed; and (3) death sentence was not excessive or disproportionate considering premeditated and calloused manner in which defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life.

No error.

Exum, J., dissented and filed an opinion.

Carlton, J., concurred and filed an opinion in which Branch, C. J., joined.

1. Jury ⇐108

Prospective jurors were properly excused for cause from capital case after they each stated unequivocally that, even before hearing any evidence in case, they could not under any circumstances impose death penalty upon defendant.

2. Jury ⇐108

Prospective juror's statement that she did not think she could impose death penalty in capital case under any circumstances constituted an expression of a sufficient refusal to follow the law, that of capital punishment, to warrant excusal for cause.

3. Constitutional Law ⇐267
Jury ⇐33(2.1)

Excusal of jurors from capital case for cause due to their stated opposition to the death penalty did not deprive defendant of his constitutional rights to trial by a jury representing a cross section of the community or to due process of law. U.S.C.A. Const.Amends. 5, 6, 14.

4. Criminal Law ⇐717

District attorney's statement in final argument that defense of intoxication to charge of first-degree murder required intoxication to such a degree as to render defendant utterly and totally incapable of forming intent to kill and to carry out intent correctly conveyed substance of law of intoxication to jury.

5. Criminal Law ⇐720(9)

District attorney's remarks in closing argument with respect to intoxication defense to charge of first-degree murder, although colorful in terminology, were compatible with evidence in case.

6. Criminal Law ⇐720(9)

District attorney was authorized to argue to jury that facts did not support a credible defense of intoxication to charge of first-degree murder.

7. Criminal Law ⇐778(5)

In prosecution for first-degree murder, trial court's instructions upon intoxication defense were entirely correct, and did not shift burden to defendant to disprove his capacity to form a specific intent to kill after premeditation and deliberation.

8. Criminal Law ⇐666½

A prosecutor has an implicit duty not to obstruct defense attempts to conduct interviews with any witnesses.

9. Criminal Law ⇐1168(2)

Reversal for a prosecutor's obstruction of defense attempts to conduct interviews with witnesses is only warranted when it is clearly demonstrated that prosecutor affirmatively instructed a witness not to cooperate with defense.

10. Criminal Law ⇐1168(2)

In absence of anything in record to substantiate defendant's claim of prosecutorial misbehavior in refusing to allow State's eyewitnesses to be interviewed by a medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense, reversal was not warranted.

11. Criminal Law ⇐1168(2)

Where there was no evidence tending to show that defense counsel actually approached State's witnesses for stated purpose of arranging interviews with a medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense only to be rejected on account of district attorney's prior, direct instructions to witnesses not to cooperate with defense, prosecutorial misbehavior warranting reversal was not demonstrated.

12. Criminal Law ⇐666½

Where bare summary of proceedings held by trial court on defendant's motion for an order directing district attorney to make State's eyewitnesses available for interviews with medical expert who had been appointed to assist in preparation and evaluation of defendant's intoxication defense made it plain that witnesses themselves refused to talk with defense expert on advice of their own individual attorneys, trial court did not err in denying motion.

13. Criminal Law ⇐633(1), 641.12(1)

In view of alternative methods for defendant's medical witness to obtain necessary information from State's eyewitnesses in order to assist in preparation and evaluation of intoxication defense, including attendance at trial and listening to witnesses' testimony or taking notes on testimony or relaying a transcript to expert for his formulation of opinion upon extent of defendant's impairment from intoxication at time of killings, trial court's denial of pretrial motion for order directing district attorney to make eyewitnesses available for interviews with expert did not deprive defendant of effective assistance of counsel or a fair trial.

14. Criminal Law ⇐1153(4)

Scope of cross-examination rests largely within discretion of trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice.

15. Witnesses ⇐268(1)

Defendant's constitutional rights of confrontation and due process were not unlawfully restricted by trial court's sustaining prosecutor's objections to defendant's cross-examination of State's witnesses concerning amount of beer drunk by defendant on night of murders, his level of intoxication and nature of his behavior in light of failure to demonstrate error in trial court's limiting scope of cross-examination.

16. Criminal Law ⇐1170½(1)

Defendant had no cause for complaint on appeal of trial court's sustension of prosecutor's objections to defendant's cross-examination of State's witnesses concerning amount of beer drunk by defendant on night of murders, his level of intoxication, and nature of his behavior where defendant effectively received benefit of evidence sought after in that, in several instances, witnesses actually answered questions of defense counsel despite prosecutor's objections and trial court's sustension thereof, prosecutor did not move to strike answers, and trial court did not admonish jury to disregard them.

17. Homicide ⇐164

Trial court's exclusion on recross-examination of defendant's question to expert medical witness as to whether murder victims were legally intoxicated at time of their deaths was proper in that question concerned irrelevant matters which had no logical tendency to prove a fact in issue at defendant's trial for murder.

18. Criminal Law ⇐1170(4)

Defendant was not prejudiced by trial court's exclusion on recross-examination of defendant's question to expert medical witness as to whether victims were legally intoxicated at time of their death where witness had already repeatedly stated during his direct, cross and redirect examina-

tions that the blood alcohol levels of both victims indicated their intoxication at death.

19. Criminal Law ⇐338(1)

Defense counsel's questioning of witness about whether witness was influenced by alcohol he had drunk on night of murders, as to whether witness had ever seen defendant when he was not "high" on drugs or alcohol, and as to whether defendant and a friend were "drunk" when they "mooned" a police officer earlier in evening of murders did not seek to elicit relevant information having a direct bearing upon defendant's intoxication impairment at time he committed murders, and thus trial court's sustension of prosecutor's objections to such questions and its rulings thereon did not improperly hinder defendant's efforts to present intoxication defense.

20. Criminal Law ⇐464

Trial court's sustension of prosecutor's objections to questions which were not competently framed to elicit witness' opinion about defendant's general intoxication based upon precise legal meaning of that term did not improperly hinder defendant's efforts to present his intoxication defense.

21. Criminal Law ⇐1166.22(2), 1171.1(3)

In light of defendant's affirmative admissions throughout trial of existence of malice and unlawfulness in his commission of two "second degree" murders, there could not possibly be any constitutional transgressions or prejudice in remarks of either prosecutor or trial court concerning presumption of existence of those very same elements in charges of first-degree murder.

22. Criminal Law ⇐1166.22(7), 1171.3

Where trial court's and prosecutor's use of presumption of existence of malice and unlawfulness in charges of first-degree murder did not alleviate in any manner State's overall burden of proving existence of every element of first-degree murder beyond a reasonable doubt, there could not possibly be any constitutional transgressions or prejudice in remarks of either prosecutor or trial court concerning such presumption.

23. Stipulations ⇐14(10)

Illustrative relevancy of photographs depicting appearance of victims' bodies at time of forensic pathologist's examination, which directly corresponded to forensic pathologist's testimony, was not nullified by defendant's "stipulation" as to cause of death.

24. Criminal Law ⇐438(5)

State's introduction of ten photographs depicting appearance of murder victims' bodies at time of forensic pathologist's examinations was not an introduction of an impermissibly excessive number of photographs under circumstances of case.

25. Criminal Law ⇐438(7)

Probative force of photographs' depictions of unattractive markings of victims' violent deaths, as seen by examining forensic pathologist, was not outweighed by their tendency to repulse the sensibilities or to arouse the sympathy of the viewer; thus, introduction of photographs into evidence in prosecution for first-degree murder was not error.

26. Criminal Law ⇐1037.1(1)

Despite absence of objection, State's argument in capital cases is subject to limited appellate review for existence of gross improprieties which make it plain that trial court abused its discretion in failing to correct prejudicial matters ex mero motu.

27. Criminal Law ⇐720(9)

In view of testimony of eyewitness that defendant had a grin on his face when he shot victims and testimony of police officer that defendant had told him that his only regret about the death of one victim was that he would not be able to kill him again, district attorney's remarks during closing argument about defendant's enjoyment of killings were not improper but were supported by evidence and reasonable inferences therefrom.

28. Criminal Law ⇐728(5)

District attorney's statements during final argument describing what defendant

must have been thinking as he sat quietly behind bar holding shotgun immediately prior to killings were not so prejudicial that trial court was required to take corrective action even in absence of an objection.

29. Criminal Law ⇐728(5)

Where district attorney's uncomplimentary and disparaging characterization of defendant as an animal who killed for pleasure was entirely warranted by evidence, there was no gross error in characterization requiring trial court to take corrective action even in absence of an objection.

30. Criminal Law ⇐986.1

Scope of argument at sentencing hearing is governed by same general rules that apply to argument during guilt proceedings.

31. Criminal Law ⇐1042

When prosecutorial remarks during sentencing phase of trial were not objected to at trial, alleged impropriety must be glaring or grossly egregious for Supreme Court to determine that trial judge erred in failing to take corrective action sua sponte.

32. Criminal Law ⇐986.1, 1177

Where evidence in capital case reasonably supported conclusion that defendant enjoyed committing killings, district attorney's further extrapolations during sentencing phase about the unusually callous and playful nature of defendant's murderous acts were legitimate under evidence and were not extreme or prejudicial per se.

33. Criminal Law ⇐986.2(1)

Circumstances of offense and defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation in sentencing; however, ultimate issue concerning admissibility of such evidence must still be decided by presiding trial judge, and his decision is guided by usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.

34. Criminal Law ⇐986.2(1)

Evidentiary flexibility is encouraged in serious and individualized process of life or death sentencing.

35. Criminal Law ⇐986.2(3)

As in any proceeding, evidence offered at sentencing must be pertinent and dependable and, if it passes such test in first instance, it should not ordinarily be excluded. G.S. § 15A-2000(a)(3).

36. Criminal Law ⇐996(1.1)

New sentencing hearing in capital case should not be ordered by Supreme Court for trial judge's exclusion of evidence at penalty phase unless defendant demonstrates existence of patent, prejudicial error. G.S. § 15A-2000.

37. Criminal Law ⇐986.2(3)

In light of fact that there was substantial evidence of defendant's regrets for killings already in evidence, it was not error for trial court to exclude upon objection further testimony upon same subject by witness.

38. Criminal Law ⇐1177

Trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial was not reversible error in that letters added little to in-court testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it.

39. Criminal Law ⇐986.2(3)

Although defendant's habits regarding alcohol and drug misuse were relevant mitigating factors for jury's consideration in capital case, precise details of his particular overdoses were not pertinent to his sentencing; thus, trial court did not err in refusing to permit witness to testify about circumstances of defendant's various hospitalizations for drug overdoses. G.S. § 15A-2000(a)(3).

40. Criminal Law ⇐986.2(3)

Trial court correctly sustained prosecutor's objection at sentencing hearing to defense counsel's attempt to elicit an opinion from a psychiatrist about whether defendant would be able to adjust to life in prison

where such an opinion would have concerned a matter totally irrelevant to sentencing of defendant convicted of two first-degree murders since, regardless of his ability to adjust to prison life, defendant was already subject to mandatory imposition of life imprisonment. G.S. §§ 14-17, 15A-2000(a)(1), 15A-2002.

41. Criminal Law ⇐469

Even assuming that defendant's ability to cope in prison had some slight relevance to his sentencing following conviction of two first-degree murders, psychiatrist's opinion about whether defendant would be able to adjust to life in prison was properly excluded where there was an insufficient foundation in record for a conclusion that he was better qualified to have an opinion on this subject than the jury. G.S. § 15A-2000.

42. Criminal Law ⇐473

Where psychiatrist admitted that he could not render an opinion about defendant's blood alcohol level at time of shootings within a reasonable degree of medical certainty, evidence, although relevant, was unreliable and lacked probative value, and thus was properly excluded at sentencing hearing. G.S. § 15A-2000.

43. Witnesses ⇐266

General rule that truthfulness of any aspect of any witness's testimony may be attacked on cross-examination applies to all trial proceedings, including both guilt and sentencing phases in capital cases.

44. Criminal Law ⇐1171.8(2)

Defendant's ability to afford alcohol and drugs bore upon credibility of his self-serving statements about their constant use, introduced as mitigating factors in sentencing phase of capital case, so that prosecutor's repeated questioning of defendant as to specific source of money to buy all the beer and drugs he allegedly consumed did not constitute prejudicial error despite defendant's contention that the persistent questioning about money improperly suggested to jury that he must have committed other criminal offenses to support his habits.

45. Witnesses ⇐280, 282½

Persistent nature of prosecutor's questioning of defendant during sentencing phase of capital case as to source of money used to buy all the beer and drugs which defendant said he had taken every day for five years was not abusive in light of defendant's evasive and unresponsive answers.

46. Witnesses ⇐277(2)

Scope and fairness of cross-examination of defendant during sentencing phase of capital case was a matter left to sole discretion of trial judge, and prosecutor had a right to sift or press defendant in order to get a direct and clear response to his questions as to source of money used to buy all the beer and drugs which defendant said he had taken every day for five years.

47. Criminal Law ⇐730(3)

Although defendant's objection to prosecutor's inferential inquiry during sentencing phase of capital case as to whether stealing was specific source of money used to buy all the beer and drugs which defendant said he had taken every day for five years was well taken in that question amounted to speculative insinuation of prior criminal conduct with no ascertainable good-faith factual basis, trial court's prompt sustension of defendant's objection to disapproved question sufficiently averted any prejudice to defendant in light of fact that it was a single impropriety.

48. Criminal Law ⇐1171.1(2)

Prosecutorial statements are not placed in an isolated vacuum on appeal; fair consideration must be given to context in which remarks were made and to overall factual circumstances to which they referred.

49. Criminal Law ⇐700

Prosecutor of a capital case has a duty to pursue ardently the goal of persuading jury that facts in evidence warrant imposition of ultimate penalty. G.S. § 15A-2000(a)(4).

50. Criminal Law ⇐724(2)

District attorney's comment during jury argument in penalty phase of capital case that defendant was "not Jack the Ripper yet" did not overstep bounds of permissible argument where comment was tempered by prior explanation to jury that it could consider any facts or circumstances which it deemed to have mitigating value, including defendant's admitted lack of significant criminal history. G.S. § 15A-2000.

51. Criminal Law ⇐713

District attorney's expressions during jury argument in penalty phase of capital case concerning his belief in death penalty and propriety of imposition in instant case did not overstep bounds of permissible argument in view of fact that such expressions had to be weighed with his frequent reminders to jury that it would have to determine what appropriate punishment should be. G.S. § 15A-2000.

52. Criminal Law ⇐724(2)

District attorney's characterization during jury argument in sentencing phase of capital case of defendant's mind as a "cesspool" could not be deemed unfair in light of defendant's own admissions that he killed victims intentionally and maliciously simply because one of victims had wrongfully worn insignia or emblem of defendant's motorcycle gang sometime in the past. G.S. § 15A-2000.

53. Criminal Law ⇐723(1)

District attorney's statement to jury during sentencing phase of capital case that it would not have hesitated to give defendant his "just reward" right there on the spot if it had actually witnessed murders, although disapproved, was not an inflammatory invitation for jury to act like a lynch mob in light of fact that district attorney noted that law did not work that way. G.S. § 15A-2000.

54. Criminal Law ⇐1171.1(6)

District attorney's complaints during jury argument in sentencing phase of capital case about how he could not bring in family members to testify about "trials and travails" of murder victims' lives, in contrast to all of evidence about defendant's family and personal history received in mitigation, contained nothing inherently prejudicial since district attorney was merely reminding jury that, although it did not know much about him, it should also carefully consider value of victim's life in making its life or death decision about defendant. G.S. § 15A-2000.

55. Criminal Law ⇐796

Common sense, fundamental fairness, and judicial economy dictated that any reasonable doubt concerning submission of a statutory or requested mitigating factor be resolved in defendant's favor to insure the accomplishment of complete justice at first sentencing hearing. G.S. § 15A-2000.

56. Criminal Law ⇐1172.9

Same standard of appellate review continues to apply whether trial court commits error at guilt phase or penalty phase; thus, a new sentencing hearing will not be ordered for erroneous failure to submit a mitigating circumstance if that error was harmless beyond a reasonable doubt. G.S. § 15A-1443(b).

57. Criminal Law ⇐1177

Defendant demonstrates reversible error in trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes that particular factor was one which jury could have reasonably deemed to have mitigating value, that there was sufficient evidence of existence of factor, and that, considering case as a whole, exclusion of factor from jury's consideration resulted in ascertainable prejudice to defendant. G.S. § 15A-2000.

58. Criminal Law ⇐986.2(1)

Mentality of a defendant is generally relevant to sentencing and it can, with supporting evidence, be properly considered in mitigation of a capital felony. G.S. § 15A-2000.

59. Homicide ⇐311

Although fact that defendant had scored 66 on an intelligence test unquestion-

ably related to defendant's mentality, and defendant would have been entitled to an instruction about specific intelligence quotient if he had tendered properly worded request therefor, defendant's evidence, including testimony of psychiatrist that defendant's other tests indicated his I.Q. was probably a little higher than 66 and fell at least into low-normal range of intelligence, did not authorize submission of instruction to jury during sentencing phase of capital case as to his "relatively low mentality." G.S. § 15A-2000.

60. Homicide ⇐341

Trial court's omission, during sentencing phase of capital case, of defendant's requested instruction on his "relatively low mentality" was not prejudicial, despite psychiatrist's testimony that defendant's intelligence quotient fell at least into low-normal range of intelligence, since jury could have elected to consider such factor under trial court's instruction permitting jury to evaluate any other circumstances arising from evidence which it deemed to have mitigating value. G.S. § 15A-2000(f)(9).

61. Homicide ⇐311

Psychiatrist's testimony during sentencing phase of capital case that defendant had "psychological problems" and was "a very passive person that exhibits *some* chronic depression in terms of how he functions in life," but that defendant was "not basically a violent person" and that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence" did not support submission upon trial court's own motion of statutory mitigating circumstances that defendant committed murders while he was "under the influence of a mental or emotional disturbance." G.S. § 15A-2000(f)(2).

62. Homicide ⇐341

Trial court's failure to submit sua sponte, during sentencing phase, statutory mitigating circumstances that defendant committed murders while he was "under the influence of a mental or emotional disturbance" did not constitute prejudicial error since jury could have elected to consider such factor pursuant to trial court's instruction upon open-ended provision of capital punishment statute permitting jury to evaluate any other circumstances arising from evidence which it deemed to have mitigating value. G.S. § 15A-2000(f)(2, 9).

63. Criminal Law ⇐161

Submission of each of two killings as an aggravating circumstance for the other under the "course of conduct" provision of capital punishment statute at initial sentencing hearing jointly held on dual capital convictions did not violate protection against double jeopardy. U.S.C.A.Const. Amends. 5, 14; G.S. § 15A-2000(e)(11).

64. Criminal Law ⇐161

Thrust of concept of double jeopardy is that a defendant may not be unfairly subjected to multiple prosecutorial attempts to obtain a conviction or a certain penalty for same offense nor may a defendant receive multiple punishment for same offense. U.S.C.A.Const.Amends. 5, 14.

65. Criminal Law ⇐163

Principle of double jeopardy does not prevent prosecution from relying, at sentencing phase of capital case, upon a related course of criminal conduct by defendant as an aggravating factor to enhance punishment of defendant for another distinct offense, and this is so irrespective of whether defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor. U.S.C.A. Const.Amends. 5, 14; G.S. § 15A-2000.

66. Criminal Law ⇐796

Trial court's direction to jury in sentencing phase of capital case that it need not specify which mitigating circumstances on written list it found, while not the better practice, did not constitute error. G.S. § 15A-2000.

67. Criminal Law ⇐884

Jury may not arbitrarily or capriciously impose or reject a sentence of death; instead, jury may only exercise guided discretion in making underlying findings required

for a recommendation of death penalty within carefully defined set of statutory criteria that allows them to take into account the nature of the crime and the character of the accused. G.S. § 15A-2000(b, c).

68. Criminal Law ⇐796

Jury was correctly informed during sentencing phase of capital case that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under capital punishment statute. G.S. § 15A-2000(c).

69. Homicide ⇐311

Submission to jury in sentencing phase of capital case of aggravating circumstance that murders were especially heinous, atrocious, or cruel is appropriate only when there is evidence of excessive brutality beyond that normally present in any killing, or when facts as a whole portray commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to victim. G.S. § 15A-2000(e)(9).

70. Homicide ⇐354

Evidence of defendant's careful execution of deliberate and premeditated plan for murder and that deaths of both unsuspecting victims were not instantaneous and involved infliction of unusual physical or psychological torture was sufficient to support finding of jury that murders were especially despicable and wanton under capital punishment statute. G.S. § 15A-2000(e)(9).

71. Criminal Law ⇐1206(1)

Death sentence review mandated by capital punishment statute provides a sufficient constitutional safeguard against unconstitutional imposition of cruel and unusual punishment. G.S. § 15A-2000(d)(2).

72. Criminal Law ⇐1206(2)

Intended ultimate emphasis of proportionality review of a death sentence under capital punishment statute is upon independent consideration of individual defendant and nature of crime or crimes which he has committed. G.S. § 15A-2000(d)(2).

73. Criminal Law ⇐1206(1)

Bifurcated trial proceedings of capital punishment statute, in which same jury determines both guilt and punishment issues, and resultant use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to death penalty, are constitutional. G.S. § 15A-2000.

74. Criminal Law ⇐1206(1)

Submission in appropriate cases, of sufficiently clear statutory aggravating circumstance of capital punishment statute that capital felony is "especially heinous, atrocious, or cruel" is constitutional. G.S. § 15A-2000(e)(9).

75. Criminal Law ⇐1206(1)

Placing burden on defendant, in capital case, to persuade jury, by a preponderance of the evidence, that a particular mitigating circumstance exists is constitutional. G.S. § 15A-2000.

In relevant part, the evidence for the State tended to show the following. On 16 October 1979, defendant, a nineteen year old white male, was walking on Merritt Drive in Greensboro with his friend Jimmy Eanes when he happened to meet Freddie Pachaco. Defendant did not like Pachaco because he had been friendly with a girl defendant liked and had, without proper entitlement, worn the personal insignia ("colors") of a motorcycle gang on his jacket. On this occasion, defendant told Eanes that he "hated that punk" (Pachaco) and wanted to fight him right then and there. This did not occur, however, because Pachaco was conciliatory and offered defendant some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Sometime later, Pachaco asked defendant outright whether he was "after" him. Defendant replied that he was not and further said that "if [he] was going to kick [Pachaco's] ass, [he] would have already done it."

On the following day starting at about noon, several people began to congregate at the trailer, where defendant apparently lived, to drink beer and listen to music.

The merrymakers included Jimmy Eanes, Shawn Feeney, Keith Way, Billy Stanley and Leslie Hearl (who later married Stanley before trial). Pachaco and his friend Tommy Ausley also unexpectedly joined the party and bought two cases of beer. Everybody was calm and pleasant and seemed to be having a good time. However, defendant told several of his friends during the course of the party that he disliked, or didn't have "much use for", Pachaco and said he would like to kill him. Later in the evening, defendant took Feeney's shotgun and fired it at the clothesline three times. A deputy sheriff came to the trailer to investigate the disturbance, but he soon departed after talking to defendant.

Upon defendant's suggestion, everyone decided to leave the trailer and go to the Stroker Motorcycle Clubhouse, which was located in some woods near Wendover Avenue in Greensboro. Defendant had reasoned that they could make as much noise as they wanted to out there and get more beer besides. [It was approximately 10:00 p. m.] While everyone prepared to move, defendant quickly slipped out to a nearby trailer where he borrowed a shotgun. He returned with the gun and told Eanes to ride with Pachaco and Ausley to make sure they got to the clubhouse. The entire party then proceeded to the rendezvous in various vehicles, caravan style. En route, defendant retained the shotgun and told his companions that he was going to kill Pachaco and Ausley.

When the group arrived at the clubhouse, defendant opened the door while he continued to hold the shotgun. Once inside, the members of the party played games, drank beer and listened to music. Billy Stanley and Leslie Hearl left the company and went into an adjacent room to have sexual intercourse. While everyone else engaged in these various recreational activities, defendant sat silently behind the bar with the shotgun in his lap. Sometime later, defendant gave his knife to Eanes and instructed him to cut Pachaco's jugular vein and promised to back him up with the shotgun. Eanes attacked Pachaco but only succeeded in cutting him on the throat. Pachaco became emotional at this point but did not fight back. Ausley attempted to help Pachaco and was confronted by Eanes who threw a chair at him. At this point in the evening's events, the testimony of the eyewitnesses differed somewhat. Nevertheless, the overall weight of that testimony combined with the evidence of defendant's own pre-trial statements to law officers tended to show the following occurrences.

Immediately after the throat-slashing incident between Eanes and Pachaco, defendant raised the shotgun and pointed it at Pachaco. Pachaco told defendant, "I will go down laughing." Without saying a word, defendant shot him in the chest. Defendant then turned toward Ausley, whom he had never seen before that day. Ausley pleaded with defendant and said, "don't shoot me," "[n]o, not me." Defendant shot him anyway. Pachaco was still moaning. Defendant walked over to where he lay helpless on the floor and shot him again at point blank range just below the heart. Pachaco and Ausley died from the gunshot wounds. During the shootings, defendant had "a sort of grin" on his face.

Defendant, apparently with a full realization of what he had just done, walked outside to the porch of the clubhouse and told Feeney and Way that he had "blown away" two dudes. He then directed everyone to help him dispose of the bodies. The bodies were placed in an automobile which Eanes drove to Causey Street and abandoned in a ditch. Defendant did not return to his residence; instead, he went home with Stanley and Hearl. On the way, he told Stanley that he had killed Pachaco and Ausley because he "didn't have any use for people like that." Defendant was not upset and seemed to have no regrets about the murders. He went to sleep. The next day, Stanley and Hearl returned to the clubhouse at defendant's behest and cleaned up the blood on the floor. Another member of the Stroker motorcycle gang painted the steps to conceal bloodstains.

The bloody car and bodies of Pachaco and Ausley were discovered in the early morn-

ing hours of 19 October 1979. Defendant took a bus to California where he was subsequently arrested on 28 January 1980. Defendant waived extradition on 4 February 1980 and was picked up by two officers of the Greensboro Police Department two days later. During the flight back to North Carolina, defendant made a full confession to the murders. [He was advised of his constitutional rights and executed the required waiver form.]

Defendant presented no independent evidence during the guilt determination phase of the proceedings. The defense did, however, elicit evidence during cross-examination of prosecution witnesses tending to show that defendant was drunk when the killings occurred.

The jury found defendant guilty of two counts of first-degree murder. The State relied on its evidence presented during the guilt phase of the trial and did not offer additional evidence during the sentencing hearing. The State did, however, argue that the murders were especially heinous because defendant committed them for sport and amusement. In addition, the State contended that the killing of the eighteen-year-old Ausley was particularly despicable because defendant had shot him in cold blood as he begged and pleaded for his life. On the other hand, defendant offered much evidence in mitigation of his criminal acts, including the following facts: his youth; the divorce of his parents during his childhood; his chronic drug and alcohol abuse since the age of twelve; his leaving home at the age of thirteen (from that time on, he had lived on his own); his low intelligence; his psychological problems of depression, conflicts in relationships and poor judgment; and his feelings of remorse over the killing of Ausley. In its instructions upon the sentencing phase of the case, the court submitted two aggravating circumstances for the jury's consideration: (1) the murders were especially heinous, atrocious or cruel, G.S. 15A-2000(e)(9); and (2) each murder was part of a course of conduct in which defendant committed a crime of violence against another person, G.S. 15A-2000(e)(11). The court also submitted ten mitigating circumstances to the jury. The jury subsequently found one or more of the mitigating factors but also unanimously found them to be outweighed by the foregoing aggravating circumstances beyond a reasonable doubt. The jury therefore recommended imposition of the death penalty for both murders, and the court so ordered.

Additional facts, which become relevant to defendant's specific assignments of error, shall be incorporated into the opinion.

Atty. Gen. Rufus L. Edmisten by Asst. Atty. Gen. Joan H. Byers, Raleigh, for the State.

Appellate Defender Adam Stein and Ann B. Peterson, Raleigh, pro hac vice for defendant-appellant.

COPELAND, Justice.

Defendant brings forward many assignments of error which he contends require a new trial of these crimes, or a new sentencing hearing, or both. We disagree and affirm the sentences of death imposed upon the jury's recommendations.

At the outset, we must note that defendant's appellate counsel filed a brief which is 109 pages long.[1] A defendant who stands convicted in a capital case is, of course, entitled to effective and diligent advocacy in the presentation of his appeal. However, defendant's brief seems unduly lengthy and quite repetitious. Common sense dictates that there must be an end to what can be said in behalf of any cause and that good judgment and prudence should prevail in the legal art of brief-writing.[2] Indeed, the volume of a brief should always be an accurate reflection of the substance of the arguments presented therein. We therefore exhort practitioners before this Court to seek excellence first, not excessiveness, in the preparation of briefs and remind them that the ability to be direct and concise is a

1. The State was understandably forced to respond in like kind with a 90 page brief.

2. Our Rules of Appellate Procedure do not set a formal limit upon the length of a brief.

formidable weapon in the arsenal of appellate advocacy. We now direct our attention to the merits of the case and address defendant's arguments in the order in which they appear in his brief.

GUILT PHASE: I—V

I.

Forty-two veniremen were examined over a period of five days before a jury of twelve was impanelled to try this case. During the selection process, the trial court excused eight prospective jurors for cause due to their stated opposition to the death penalty. Defendant contends that the trial court's action deprived him of his constitutional rights of due process and trial by jury. The record plainly refutes this argument.

[1, 2] The applicable constitutional standard permits the excuse of a potential juror for cause if it is established that he "would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case . . . ." *Witherspoon v. Illinois*, 391 U.S. 510, 522 at n. 21, 88 S.Ct. 1770, 1777 at n. 21, 20 L.Ed.2d 776, 785 at n. 21 (1968); *see State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). It is unmistakably clear that seven of the eight potential jurors were properly excused according to this standard after they each stated unequivocally that, even before hearing any evidence in the case, they could not under any circumstances impose the death penalty upon this defendant. *State v. Oliver*, 302 N.C. 28, 39-40, 274 S.E.2d 183, 191 (1981). It is equally clear that the remaining juror, Mary Neal, was also correctly removed from the panel when, after some initial equivocation, she finally stated that she did not "believe" that she could impose the death penalty regardless of the evidence. The court thereupon asked her, "Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?" Ms. Neal replied, "No, I just don't think so." Considering her answers contextually, we find that Ms. Neal expressed a sufficient refusal to follow the law, that of capital punishment, which might become applicable to the case. *State v. Avery*, 299 N.C. 126, 137, 261 S.E.2d 803, 810 (1980); *see State v. Taylor*, 304 N.C. 249, 266, 283 S.E.2d 761, 773 (1981).

[3] The excuse of these jurors for cause did not deprive defendant of his constitutional rights to trial by a jury representing a cross-section of the community or due process of law. *State v. Avery, supra*, 299 N.C. at 137-38, 261 S.E.2d at 810; *State v. Cherry, supra*, 298 N.C. at 106, 257 S.E.2d at 564. We would add, moreover, that the need for their excuse was manifest. It would have amounted to an absurdity and a mockery of our law to have permitted these jurors to sit on a case where imposition of the death penalty was an available sentencing option. For, if capital cases could be tried by juries which included persons *firmly* opposed to the maximum prescribed penalty sought by the State, the separate sentencing hearing mandated by G.S. 15A-2000 would almost certainly become a futile and meaningless exercise, contrary to the expressed will of our citizenry in the enactment of capital punishment legislation.

II.

At trial, defendant contested the premeditation and deliberation elements of first degree murder primarily through the presentation of an intoxication defense. Defendant believes that he was unconstitutionally deprived of the substance of this defense by certain improper comments of the prosecutor and a series of erroneous rulings by the trial court.[3] We are not so persuaded and overrule these assignments of error.

3. This "single" argument in defendant's brief really addresses four distinct issues (howbeit with a common denominator: the intoxication defense). Clarity of review is enhanced by the *separate* statement of each question and its corresponding argument. *See* N.C. Rules of Appellate Procedure, Rule 28(b)(3) [Revised Rule 28(b)(5) (Supp.1981)].

[4-6] (a) In his closing argument to the jury, the district attorney stated, in pertinent part, the following:

> [E]ven if you want to conclude that Michael Pinch was drunk because he said in the statement sometime that he was, he's still guilty because drunkenness is no defense. You have to be so drunk as to be utterly and totally incapable, unable to form the intent to kill and to carry that out; so drunk as to be unable, incapable of understanding the nature and consequence of your act. That is not present here. There is no way you can conclude that anybody was intoxicated to that extent—not on these facts.
>
> You can't find it in your conscience and mind, your heart to dignify what happened out there and impartially excuse it on voluntary intoxication. It is not present on this evidence. I suggest to you that there is not even ample evidence to find that he was intoxicated or drunk. No drugs in this case. Beer. Just beer. You just—you can't let him sell that to you. It is not there. It didn't happen. Nobody could have been intoxicated to the extent that the law requires and do what he did in the manner he did it. There just simply—it is offensive to reason and common sense. It stinks to high heaven. (Record at 241, 250).

We can perceive no error in this. Contrary to defendant's assertions, the district attorney correctly conveyed the substance of the law of intoxication to the jury. *See State v. Goodman*, 298 N.C. 1, 12-14, 257 S.E.2d 569, 578-79 (1979). In addition, although some of the foregoing comments were colorful in terminology, we find that as a whole the remarks were compatible with the evidence in the case and that the district attorney was certainly authorized to argue to the jury that the facts did not support a credible defense of intoxication.[4] *See State v. Noell*, 284 N.C. 670, 202 S.E.2d 750 (1974), *death sentence vacated*, 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed.2d 1205 (1976).

[7] (b) We likewise believe that the trial court's instructions upon the intoxication defense were entirely correct. The record shows that the able judge carefully explained the law in every respect in accordance with the decisions of this Court. *See State v. Propst*, 274 N.C. 62, 161 S.E.2d 560 (1968); N.C.P.I.—Crim. 305.10 (1970). *See also* 4 Strong's N.C. Index 3d, Criminal Law § 6 (1976). We also reject defendant's argument that the judge improperly shifted the burden to defendant to disprove his capacity to form a specific intent to kill after premeditation and deliberation. Viewed as a whole, the judge's charge was not reasonably susceptible of such an erroneous interpretation.

[8, 9] (c) Defendant contends that the trial court erred in denying his pre-trial motion for an order directing the district attorney to make the State's eyewitnesses "available" for interviews with a medical expert who had been appointed to assist in the preparation and evaluation of an intoxication defense. It should be recognized at once that nothing in our statutory discovery provisions would require *the State to compel* its witnesses to submit to any form of interview or questioning by the defense prior to trial; in fact, the State does not even have to afford the defense pre-trial access to a list of its potential witnesses or copies of any statements they may have made. *See* G.S. 15A-903 and 15A-904; *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1982); *State v. Abernathy*, 295 N.C. 147, 244 S.E.2d 373 (1978). Nevertheless, it is true that a prosecutor has an implicit duty not to

4. Under this argument heading in the brief, appellate counsel improperly listed several other exceptions to remarks of the district attorney which were unrelated to the intoxication defense. Such exceptions are not pertinent to the precise question stated. *See* Rule 28(b)(3), *supra*, note 3. Five of these exceptions are argued again under assignment of error no. 27 which is reviewed in Part V of the opinion, *infra*. With regard to the remaining "irrelevant" exceptions presented here, it sufficies to say that the comments, which were not objected to at trial, did not transcend the permissible bounds of argument in hotly contested cases and certainly did not amount to gross improprieties in any event. *See State v. Lynch*, 300 N.C. 534, 268 S.E.2d 161 (1980); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979).

obstruct defense attempts to conduct interviews with *any* witnesses; however, a reversal for this kind of professional misconduct is only warranted when it is clearly demonstrated that the prosecutor affirmatively instructed a witness not to cooperate with the defense. *State v. Mason*, 295 N.C. 584, 587-88, 248 S.E.2d 241, 244 (1978), *cert. denied*, 440 U.S. 984, 99 S.Ct. 1797, 60 L.Ed.2d 246 (1979); *State v. Covington*, 290 N.C. 313, 343, 226 S.E.2d 629, 649 (1976).

[10-12] This record contains no such showing. The only indication of *possible* prosecutorial misbehavior is the bare allegation of defense counsel in the motion that the district attorney had told him of his specific refusal to allow the interviews in question. We find nothing in the record to substantiate this claim nor any evidence tending to show that defense counsel actually approached the potential witnesses for the stated purpose only to be rejected on account of the district attorney's prior, direct instructions to them against their cooperation. Defendant has therefore failed to present adequate grounds for reversal. *State v. Mason, supra.* In addition, the bare summary of the proceedings held by the court upon the motion make it plain that the *witnesses themselves* refused to talk with the defense expert *on the advice of their own individual attorneys.* Record at 51. Under these circumstances, neither the State nor the trial court had the power to interfere with the attorney-client privileges of the witnesses or to jeopardize their own future defenses.[5] Viewed in this light, it would have been a vain act indeed for the trial court to order the State to provide the defense with something which was, for all practical purposes, completely unavailable.

[13] In this context, the trial court did all that it could reasonably do by initially providing the defense with $1500 in state funds to hire the medical expert. In denying the motion to compel the interviews, the court reminded the defense that the same necessary information could be obtained if the expert attended the trial and listened to the witnesses' actual testimony.[6] If, as it is suggested, the additional cost of the psychiatrist's time to do just that was prohibitive, defense counsel could have taken notes upon the testimony or relayed a transcript to the doctor for his formulation of an opinion upon the extent of defendant's impairment from intoxication at the time of the killings. We conclude that the denial of the motion did not deprive defendant of effective assistance of counsel or a fair trial. *See also State v. Williams (I)*, 304 N.C. 394, 404-06, 284 S.E.2d 437, 445-46 (1981).

[14, 15] (d) We must now consider whether defendant's constitutional rights of confrontation and due process were unlawfully restricted by the trial court's sustension "of the prosecutor's objections to the defendant's cross-examination of the State's witnesses concerning the amount of beer drunk by the defendant, his level of intoxication and the nature of his behavior. . . ." Defendant's Brief at 30. Our review is governed by the well-established rule that the scope of cross-examination rests largely within the discretion of the trial court, and its rulings thereon will not be disturbed absent a clear showing of abuse or prejudice. *State v. Atkins*, 304 N.C. 582, 585, 284 S.E.2d 296, 298 (1981) (and authorities there cited). Defendant has failed to demonstrate error in the trial court's rulings; consequently, we overrule all of the pertinent underlying exceptions listed in defendant's brief.[7]

5. The witnesses sought by the defense to construct its intoxication theory were the persons who were present during the commission of the murders (and participated in the concealment thereof.)

6. It should perhaps be mentioned that the motion for the "pre-trial" interviews was actually filed after the jury selection process had already begun and only three working days before the full trial of the matter actually commenced. [In fact, the trial court heard and denied the motion on the very first day of the trial.]

7. Exceptions nos. 42, 45 and 50 bear no rational relationship to the argument concerning the "impairment" of the intoxication defense. *See* Rule 28(b)(3), *supra*, note 4. We have nonetheless reviewed these exceptions and find that the prosecutor's objections were properly sustained within the trial court's discretion. Ex-

[16] In several instances, the witnesses actually answered the questions of defense counsel despite the prosecutor's objections and the trial court's sustension thereof (exceptions nos. 27, 28, 48A). The prosecutor did not move to strike the answers, and the trial court did not admonish the jury to disregard them. Thus, defendant effectively received the benefit of the evidence sought after, and he has no corresponding cause for complaint on appeal. *State v. Hopkins*, 296 N.C. 673, 252 S.E.2d 755 (1979).

[17, 18] In another instance, defense counsel attempted to ask an expert medical witness on recross-examination whether the *victims* were legally intoxicated at the time of their deaths (exception no. 35). We believe that this question concerned irrelevant matters which had no logical tendency to prove a fact in issue at defendant's trial for murder. *See* 1 Stansbury's N.C. Evidence § 77, at 234 (Brandis rev. 1973). The relevant issue at trial was whether *defendant* was too intoxicated to form the specific intent to commit murder in the first degree. Obviously, the nature of his criminal acts was not diminished according to the sobriety or drunkenness of the unfortunate victims. Nevertheless, even assuming that this evidence had some degree of relevancy, however slight, it is unquestionably clear that defendant was not prejudiced by its exclusion on recross-examination when the doctor had already repeatedly stated during his direct, cross and redirect examinations that the blood alcohol levels of both victims indicated their intoxication at death.

[19, 20] The remaining exceptions argued herein by defendant are equally meritless. Exceptions no. 40 and 41 concerned defense counsel's questioning of the witness Eanes about whether *he* was "influenced by the alcohol [he] had drunk" on the night of the murders. Exception no. 44 related to the overly broad and legally ambiguous question to Eanes about whether he had *ever* seen defendant when he was not "*high*" on drugs or alcohol. Exception no. 48 involved a question as to whether defendant and Billy Wayne Stanley were "drunk" *when* they "mooned" an officer earlier in the evening of the murder (at the trailer). The trial court did not abuse its discretion in sustaining the prosecutor's objections to these questions, and its rulings thereon did not improperly hinder defendant's efforts to present his intoxication defense. None of the questions sought to elicit relevant information having a *direct* bearing upon *defendant's* intoxication impairment *at the time he committed the murders*. Moreover, none of the questions were competently framed to elicit a witness's opinion about defendant's general intoxication based upon the precise legal meaning of that term. *See, e.g., State v. Carroll*, 226 N.C. 237, 239-240, 37 S.E.2d 688, 690-91 (1946).

III.

The jury was advised by both the prosecutor, in his closing argument, and the trial court, in its final instructions, that the elements of malice and unlawfulness were implied in an intentional killing with a deadly weapon. Defendant maintains that his constitutional right to trial by jury was violated because the jury was not also simultaneously informed that it was not compelled to infer malice and unlawfulness, as the presumption of their existence was rebuttable. *See, e.g., State v. Hutchins*, 303 N.C. 321, 346, 279 S.E.2d 788, 804 (1981). Upon this record, defendant's position offends reason and is untenable.

[21, 22] The significant and controlling fact in this case is that defendant, through his trial counsel, *conceded* his guilt of the second degree murders of Pachaco and Aus-

ception no. 42 involved a question which was argumentative and irrelevant. Exceptions nos. 45 and 50 involved questions which sought impermissible conclusions from the witnesses about matters which were not within the realm of their personal knowledge. *See* 1 Stansbury's N.C. Evidence § 122, at 384-85 (Brandis rev. 1973).

ley.[8]. Defense counsel stated in his closing argument to the jury:

> When we started the case in selecting the jury, we told you—and also in opening remarks . . . that we were not contesting the fact that this young man over here killed two people intentionally with malice. That's never been at issue in this case. He's guilty of second-degree murder. We've admitted that all along. The State has proved it to you, but they didn't really have to. We admitted that.
>
> [W]e're admitting the intentional killing and the malice involved in this thing . . .
>
> He's guilty of second-degree murder, two of them. (Record at 226, 236).

In light of defendant's own affirmative admissions of the existence of malice and unlawfulness in his commission of two "second degree" murders, there could not possibly be any constitutional transgressions or prejudice in the remarks of either the prosecutor or the trial court concerning the presumption of the existence of those very same elements in the charges of first degree murder. "The State is not required to prove malice and unlawfulness unless there is some evidence of their non-existence. . . ." *State v. Simpson*, 303 N.C. 439, 451, 279 S.E.2d 542, 550 (1981); *State v. Hankerson*, 288 N.C. 632, 650, 220 S.E.2d 575, 588 (1975), *rev'd on other grounds*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1976). *See also Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. White*, 300 N.C. 494, 268 S.E.2d 481 (1980). Moreover, it is evident from the record that the use of the presumption did not alleviate in any manner the State's overall burden of proving the existence of *every* element of first degree murder beyond a reasonable doubt. The assignment of error is overruled.

IV.

Dr. John D. Butts, a forensic pathologist, performed the autopsies of the victims and testified at trial about the causes of their deaths. In the course of his testimony, Dr. Butts identified ten photographs as accurately depicting the appearance of the bodies at the time of his examinations. The State then introduced the photographs as exhibits (over defendant's objections). The trial court instructed the jury that it could consider the exhibits only for limited illustrative purposes, not as substantive evidence of guilt. As the jury viewed each photograph, Dr. Butts again identified its subject and explained the nature of the body's appearance as shown. Defendant argues that the introduction of these gruesome photographs and the repetitive testimony connected therewith effectively deprived him of a fair adjudication of his guilt and a fair sentencing hearing. Defendant believes that, since he "readily admitted that he killed both victims with gunshot wounds," there was no legitimate purpose or need for the use of the photographs and that they only served to inflame the passions of the jury to his decided prejudice. We disagree.

[23-25] The record clearly shows that the photographs were properly introduced according to our rules of evidence. *See State v. Marshall*, 304 N.C. 167, 282 S.E.2d 422 (1981); *State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980). The illustrative relevancy of the photographs, which directly corresponded to Dr. Butts' testimony, was not nullified by defendant's "stipulation" as to the cause of the deaths. *See State v. Elkerson*, 304 N.C. 658, 285 S.E.2d 784 (1982). In addition, the actual number of the photographs of the two bodies was not impermissibly excessive under the circumstances of this case. *See State v. Sledge*, 297 N.C. 227, 254 S.E.2d 579 (1979). Finally, the probative force of these depictions of the unattractive markings of the victims' violent deaths (as seen by the medical examiner) was not outweighed by their tendency to repulse the sensibilities, or to arouse the sympathy, of the viewer. *Compare*

8. Defendant only contested his guilt of the more grievous offenses, that of murders in the first degree, with the requisite premeditation and deliberation.

State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979); *State v. Mercer*, 275 N.C. 108, 165 S.E.2d 328 (1969).

V.

[26] Defendant assigns as error the district attorney's numerous references to facts outside the record during his closing argument to the jury during the guilt phase. No objection was interposed at trial to any of the alleged instances of misconduct. Despite trial counsel's laxity, the State's argument in capital cases is subject to limited appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*. *State v. Smith*, 294 N.C. 365, 377-78, 241 S.E.2d 674, 681-82 (1978) (and authorities there cited). Considering them contextually and according to the evidence in the case, we hold that the statements challenged here were not extreme or grossly improper.

[27-29] First, there was nothing wrong with the district attorney's remarks about defendant's enjoyment of the killings. Such comments were supported by the evidence and the reasonable inferences therefrom. *See State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). For example, Billy Wayne Stanley testified that defendant had a grin on his face when he shot the victims, and Officer Fuller testified that defendant had told him that his only regret about the death of Pachaco was that he would not be able to kill him again. Second, the district attorney's statements describing what defendant must have been thinking as he sat quietly behind the bar holding the shotgun were not so prejudicial that the trial court was required to take corrective action even in the absence of an objection. *See State v. King*, 299 N.C. 707, 711-13, 264 S.E.2d 40, 43-44 (1980). Third, and finally, we perceive no gross error in the following "comparisons" made by the State: "You've got to understand the nature of the animal you're dealing with here. I'm not a zoologist, but I don't know of a single living species on this planet that kills for pleasure. Tigers kill to eat, sharks kill to eat. Michael Pinch kills for pleasure. Think about that." Record at 250. This uncomplimentary and disparaging characterization of defendant was entirely warranted by the evidence. *State v. Ruof*, 296 N.C. 623, 252 S.E.2d 720 (1979); *State v. Westbrook*, 279 N.C. 18, 181 S.E.2d 572 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

SENTENCING PHASE: VI-XIX

VI.

[30, 31] Defendant again maintains that the district attorney improperly injected facts outside the record into his jury argument—this time during the sentencing phase of the trial. The scope of argument at the sentencing hearing is governed by the same general rules that apply to argument during the guilt proceedings; consequently, when the remarks challenged on appeal were not objected to at trial, the alleged impropriety must be glaring or grossly egregious for this Court to determine that the trial judge erred in failing to take corrective action *sua sponte*. *See State v. Johnson*, 298 N.C. 355, 368-69, 259 S.E.2d 752, 760-61 (1979). The prosecutorial expressions attacked in this appeal do not fall within the realm of reversible transgressions.

[32] All three of the exceptions set out in the brief under this assignment of error concern the district attorney's statements that the murders were especially despicable, heinous and cruel because defendant executed the victims for sport, recreation and the amusement of his friends. We have already held in part V of the opinion, *supra*, that the evidence in the case reasonably supported a conclusion that defendant enjoyed committing these crimes. That being so, it is clear that the district attorney's further extrapolations at sentencing about the unusually callous and playful nature of defendant's murderous acts were also legitimate under the evidence and were not extreme or prejudicial *per se*.

VII.

Defendant offered much evidence in mitigation of his acts during the penalty phase. In several instances, however, the trial court excluded certain evidence upon the prosecutor's objections. Defendant argues that the trial court thereby deprived him of due process and the right to be free from cruel and unusual punishment.

[33-36] Defendant's contentions must be examined against the backdrop of our capital punishment statute which provides, in conformity with the constitutional mandates of the Eighth and Fourteenth Amendments, that any evidence may be presented at the separate sentencing hearing *which the court deems* "relevant to sentence" or "to have probative value," including matters related to aggravating or mitigating circumstances. G.S. 15A-2000(a)(3); *see Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The circumstances of the offense and the defendant's age, character, education, environment, habits, mentality, propensities and criminal record are generally relevant to mitigation; however, the ultimate issue concerning the admissibility of such evidence must still be decided by the presiding trial judge, and his decision is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation.[9] *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Cherry*, 298 N.C. 86, 98-99, 257 S.E.2d 551, 559 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980). *See also State v. Goodman*, 298 N.C. 1, 30-31, 257 S.E.2d 569, 588 (1979). Consequently, we believe that a new sentencing hearing should not be ordered by this Court for the trial judge's exclusion of evidence at the penalty phase unless the defendant demonstrates the existence of patent, prejudicial error. No such showing has been made here.

Specifically, defendant argues that the trial court's sustention of various objections by the prosecutor thwarted his attempts to inform the jury about his "growing awareness of the uselessness of his life up to that point, the pain he caused others, a growing sense of maturity and feelings of remorse and regret." Defendant's Brief at 53. We find that, although some evidence was indeed excluded, the record as a whole is replete with evidence of these matters, and defendant suffered no prejudice whatsoever from the trial court's rulings.

[37, 38] It is true that the trial court sustained an initial and single objection to defendant's testimony about his current feelings of remorse over Pachaco's death; nevertheless, defendant thereafter proceeded to testify in detail about his change in heart and regret without further objection by the prosecutor. Record at 278-79. In addition, Dr. Royal, a forensic psychiatrist, testified about defendant's expressed remorse over Ausley's death. Record at 285. Since substantial evidence of defendant's regrets had already been received, it was not error for the court to exclude (upon objection) further testimony upon the same subject by the witness Sherry Olivey. In any event, defendant later succeeded in introducing more evidence about his repentant statements since the killings through the testimony of his sister and mother. Record at 289, 291-92. We likewise find no reversible error in the trial court's limited admission of defendant's five proffered exhibits consisting of letters he had written to his mother while he was incarcerated pending trial. These letters added little to the *in-court* testimony of defendant and his witnesses about his present awareness of what he had done and his sorrow for it. Even so, the trial court permitted defendant's mother to read to the jury all of exhibit five and portions of exhibits three

9. This does not mean that the evidentiary rules which normally apply at the guilt phase of the trial should also apply with *equal force* in the sentencing phase. Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. *See Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test in the first instance, it should not ordinarily be excluded. G.S. 15A-2000(a)(3), *supra*; *see Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979).

and four in which defendant had essentially stated, both in prose and poem, that it hurt him to know that he was capable of taking another's life, that he was living for the future and cleaning up his act, and that he had a mature and sincere desire to fulfill his part in life and society properly. Record at 297–99. The letters totally excluded by the court, exhibits one and two, merely repeated the same things, howbeit using different words or examples, about his remorse and his wish to be a better person. Moreover, these two letters included much material which plainly was not relevant to sentencing, *i.e.*, his apologies to his mother for not having been a better son to her despite her good efforts and his rambling philosophical questionings about why he had turned out to be so bad.

[39] Defendant also maintains that the trial court erred in not permitting Sherry Olivey to testify about *the circumstances of his various hospitalizations* for drug overdoses. We disagree. Ms. Olivey testified that she knew of occasions where defendant had taken a drug overdose and that she had visited him in Cone Memorial Hospital three months after the crimes. Certainly, defendant's *habits* regarding alcohol and drug misuse were relevant mitigating factors for the jury's consideration; however, the precise details of his particular overdoses were not pertinent to his sentencing. It was enough that the jury was informed by Ms. Olivey that:

> I can honestly say that he [defendant] drank or took something every day that I've known him [two years]. . . . He always went to the max on everything to where he couldn't walk anymore or was passed out. I have seen him when he has gone too far in the use of alcohol or the use of drugs. I have seen him take alcohol or drugs to the point where he is unconscious or in some state like that. Record at 286–87.

[40–42] Defendant finally challenges the trial court's refusal to admit certain expert testimony. These contentions lack merit. The court correctly sustained the prosecutor's objection to defense counsel's attempt to elicit an opinion from a psychiatrist about whether defendant "would be able to adjust to life in prison." Such an opinion would have concerned a matter totally irrelevant to sentencing. Defendant stood convicted of two first degree murders. *Regardless* of his ability to adjust to prison life, by law, defendant was already subject to the mandatory imposition of life imprisonment for those crimes. *See* G.S. 14–17; G.S. 15A-2000(a)(1), 15A-2002. The issue to be determined by the jury at the penalty phase was not whether defendant would prove to be a "good" prisoner but whether the overall nature of the murders and defendant's attendant acts warranted imposition of the *maximum* available penalty—death in the gas chamber.[10] The trial court also properly excluded the opinion of another psychiatrist about defendant's blood alcohol levels at the time of the shootings. Clearly, such evidence would have been relevant; however, as the doctor plainly admitted that he could not render an opinion within a reasonable degree of medical certainty, the evidence was unreliable and lacked probative value.

In sum, defendant is not entitled to a new sentencing hearing upon the ground that the foregoing classes of evidence were erroneously restricted or rejected by the trial court.

VIII.

At the penalty phase, defendant testified that he had been drinking alcohol and taking or injecting all kinds of illicit drugs

10. Even assuming that defendant's ability to cope in prison had some slight relevancy to his sentencing, we would still hold that the psychiatrist's opinion was properly excluded because there was an insufficient foundation in the record for a conclusion that he was better qualified to have an opinion on this subject than the jury. There was no evidence specifying the doctor's special experience with the prison environment; and the question posed to him essentially requested nothing more than his speculations about defendant's future prison "performance" based merely upon his observations of defendant's behavior in a mental hospital for three and a half weeks.

since he was fourteen years old. He also stated that he had been consuming approximately twelve beers a day for the three years preceding the murders. Obviously, this testimony tended to bolster defendant's evidence of mitigating circumstances. The prosecutor responded by cross-examining defendant about where he got the money to buy all the beer and drugs which he said he had taken every day for five years. Defendant answered that he had money even though he had not been employed. The prosecutor repeatedly asked defendant to identify the specific source of that money, but defendant only replied, "I just got it." The prosecutor finally asked him, "Who did you steal from?" The trial court sustained defense counsel's immediate objection to the question. Defendant complains that the prosecutor's persistent questioning about the money improperly suggested to the jury that he must have committed other criminal offenses to support his habits. On the whole, we find no prejudicial error.

[43, 44] As a general matter, the truthfulness of any aspect of any witness's testimony may be attacked on cross-examination. *See* 1 Stansbury's N.C. Evidence §§ 39-40 (Brandis rev. 1973). This basic rule applies to all trial proceedings, including both the guilt and sentencing phases in capital cases. Thus, it is clear that the prosecutor could properly attempt to impeach defendant's testimony about the actual extent of his destructive habits. Defendant's ability to afford the necessary items certainly bore upon the credibility of his self-serving statements about their constant use.

[45, 46] In addition, the persistent nature of the prosecutor's questioning was not abusive in light of defendant's evasive and unresponsive answers. The scope and fairness of the cross-examination was a matter left to the sole discretion of the trial judge, and the prosecutor had a right to sift or press defendant in order to get a direct and clear response. *See State v. Williams*, 303 N.C. 142, 147, 277 S.E.2d 434, 438 (1981); *State v. Currie*, 293 N.C. 523, 529, 238 S.E.2d 477, 481 (1977).

[47] On the other hand, however, it seems that defendant's objection to the prosecutor's inferential inquiry about the stealing was well taken. The question amounted to a speculative insinuation of prior criminal conduct with no ascertainable good faith *factual* basis. *See State v. Shane*, 304 N.C. 643, 651, 285 S.E.2d 813, 818 n. 3 (1982). Still, it was a *single* impropriety, and this case is, therefore, markedly different from *State v. Phillips*, 240 N.C. 516, 82 S.E.2d 762 (1954), where the prosecutor cross-examined the defendant in detail about *seventeen* unproved accusations of prior misconduct. Thus, we hold that the trial court's prompt sustension of defendant's objection to the disapproved question sufficiently averted any prejudice to defendant. *See State v. Williams, supra*, 303 N.C. at 147, 277 S.E.2d at 438.

IX.

Defendant assigns further error to the district attorney's jury argument during the sentencing phase. We have already overruled several of the same supporting exceptions in part VI of the opinion, *supra*, where we set forth the controlling standard of review of any jury argument which is not objected to at trial. To avoid redundancy, we shall not plow those rows again, instead, we shall limit our review to a consideration of the *additional* exceptions presented here.[11]

[48, 49] Let us begin by saying that prosecutorial statements are not placed in an isolated vacuum on appeal. Fair consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred. Moreover, it must be remembered that the prosecutor of a capital case has a duty to pursue ardently the goal of persuading the jury that the facts in evi-

11. We are compelled to question appellate counsel's organizational rationale for raising further challenges to the sentencing argument here when, logically, all contentions of this type should have been argued together in the same portion of the brief.

dence warrant imposition of the ultimate penalty. G.S. 15A-2000(a)(4); *State v. Myers*, 299 N.C. 671, 680, 263 S.E.2d 768, 774 (1980); *State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979); *State v. Westbrook*, 279 N.C. 18, 37, 181 S.E.2d 572, 583 (1971), *death sentence vacated*, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972).

[50-54] In this case, it is evident that the district attorney argued for capital punishment of defendant's murder convictions with much vim and vigor. Record at 306-10. Contrary to defendant's assertions, however, we do not believe that the district attorney's zeal caused him to overstep the bounds of permissible argument. Examining his statements in their complete context, we are convinced that he did not say anything which would amount to a gross impropriety. His comment that defendant was "not Jack the Ripper yet" was tempered by the prior explanation to the jury that it could consider any facts or circumstances which it deemed to have mitigating value, including defendant's admitted lack of significant criminal history. The district attorney's expressions concerning his belief in the death penalty and the propriety of its imposition in the case must be weighed with his frequent reminders to the jury that *it* would have to determine what the appropriate punishment should be.[12] *Compare State v. Smith*, 279 N.C. 163, 181 S.E.2d 458 (1971). The characterization of defendant's mind as a "crisspool" cannot be deemed unfair in light of defendant's own admissions that he killed the victims intentionally and maliciously simply because Pachaco had wrongfully worn the insignia or emblem of a motorcycle gang sometime in the past. The statement to the jury that it would not have hesitated to give defendant his "just reward" right there on the spot if it had actually witnessed the murders, although disapproved by us, was not an inflammatory invitation for the jury to act like a lynch mob. The district attorney noted that the law did not work that way. His comment was a colorful attempt to emphasize the cruelty and callousness with which defendant killed the victims. Finally, there was nothing inherently prejudicial in the district attorney's complaints about how he could not bring in family members to testify about the "trials and travails" of *Pachaco's* life, in contrast to all of the evidence about defendant's family and personal history received in mitigation. The district attorney was merely reminding the jury that, although it did not know much about him, it should also carefully consider the value of the victim's life in making its life or death decision about defendant.

X.—XI.

Defendant tendered in writing the following ten circumstances in mitigation:

1. The defendant has no significant history of prior criminal activity.

2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

3. The age of the defendant at the time of the crime.

4. The defendant voluntarily admitted his culpability immediately after his arrest and cooperated with police efforts to clarify the evidence in these cases and other pending cases arising out of the incident.

5. The defendant since his incarceration has appreciated the severity and error of his conduct.

6. The defendant since his incarceration has ceased the use of alcohol and drugs and is able to function with more maturity and responsibility.

7. The defendant lacks education and has a relatively low mentality.

12. For example, the district attorney stated:

> I don't know what you will conclude is appropriate. I suggest to you, with all due respect, that the conduct is appropriate to be rewarded with the ultimate sanction that our law provides.
>
> We're all people of great ability and conscience, and I ask you to consider what is appropriate for this act. Consider what is justice for Michael Pinch and for what he did. Consider the two dead boys that he left in his wake.

8. The environment in which the defendant lived until the time of his arrest was infused with violence and accepted violence as an [sic] problem-solving technique.

9. The defendant's childhood history, background, and record shows no indication of a habitually violent nature.

10. Any other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value. Record at 275.

With the exception of the last portion of number seven regarding defendant's "relatively low mentality," the trial court honored defendant's request and submitted all ten of these mitigating factors to the jury. Defendant argues that the trial court thereby erred in two ways: (1) in failing to submit his low mentality in mitigation as requested and (2) in failing to submit upon its own motion the additional statutory mitigating circumstance of G.S. 15A-2000(f)(2), *i.e.*, that he committed the murders while he was "under the influence of mental or emotional disturbance." We conclude that defendant's contentions cannot be sustained on this record.

This Court has previously established instructive guidelines for the trial judges of our State to follow in the submission of mitigating circumstances, including those which arise upon the evidence in a given capital case as well as those specified in G.S. 15A-2000(f). First, in *State v. Goodman*, we held that, although the jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted, the trial court "is not required to sift through the evidence and search out every possible circumstance which the jury might find to have mitigating value," especially when the trial court instructs the jury upon the open-ended provision of G.S. 15A-2000(f)(9) and thus does not hinder it from evaluating on its own *anything* of mitigating value. 298 N.C. 1, 33-34, 257 S.E. 569, 589-90 (1979). Second, in *State v. Johnson*, we held that the trial court must include additional factors, which are timely requested by the defendant, on the written list submitted to the jury *if* they are "supported by the evidence, and . . . are such that the jury could *reasonably* deem them to have mitigating value. . . ." 298 N.C. 47, 72-74, 257 S.E.2d 597, 616-17 (1979) (emphasis added). Third, in *State v. Hutchins*, we held that, although the trial court has a fundamental duty to declare and explain the law arising upon the evidence, it is not required to instruct upon a *statutory* mitigating circumstance *sua sponte* unless defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the specified factor. 303 N.C. 321, 355-56, 279 S.E. 788, 809 (1981); *see State v. Taylor*, 304 N.C. 249, 277, 283 S.E.2d 761, 779 (1981).

[55, 56] The rules of the foregoing cases are sound and practical, and we therefore exhort our trial judges to adhere to them carefully when presiding over the trial of capital cases. Moreover, we must also point out that common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the *first* sentencing hearing. Nevertheless, the same standard of appellate review continues to apply whether the trial court commits error at the guilt phase or the penalty phase; thus, a new sentencing hearing will *not* be ordered for the erroneous failure to submit a mitigating circumstance if that error was *harmless beyond a reasonable doubt*. G.S. 15A-1443(b); *see State v. Williams (I)*, 304 N.C. 394, 425-26, 284 S.E.2d 437, 456-57 (1981) (erroneous submission of aggravating circumstance was prejudicial and required new sentencing hearing); *State v. Taylor*, *supra*, 304 N.C. at 285-88, 283 S.E.2d at 783-85 (erroneous submission of aggravating circumstance was not prejudicial).

[57] The sum of the matter is this—a defendant demonstrates reversible error in the trial court's omission or restriction of a statutory or timely requested mitigating circumstance in a capital case only if he affirmatively establishes three things: (1)

that the particular factor was one which the jury could have reasonably deemed to have mitigating value (this is presumed to be so when the factor is listed in G.S. 15A-2000(f)); (2) that there was sufficient evidence of the existence of the factor; and (3) that, considering the case as a whole, the exclusion of the factor from the jury's consideration resulted in ascertainable prejudice to the defendant. The defendant in the instant case fails this three-prong test for a new sentencing hearing.

[58-60] We first analyze defendant's request for an instruction upon his "relatively low mentality." This factor is not listed in G.S. 15A-2000(f); however, our cases plainly indicate that the mentality of a defendant is generally relevant to sentencing and that it can, with supporting evidence, be properly considered in mitigation of a capital felony. *See State v. Johnson*, 298 N.C. 355, 367, 259 S.E.2d 752, 760 (1979), and part VII of the opinion, *supra*. In this case, a psychiatrist testified that defendant had scored 66 on an intelligence test. This fact unquestionably related to defendant's mentality, and we believe that defendant would have been entitled to an instruction about his specific intelligence quotient *if* he had tendered a properly worded request therefor. *See, e.g., State v. Williams*, 304 N.C. 394, 401, 284 S.E.2d 437, 443 (1981); *State v. Rook*, 304 N.C. 201, 211 n. 1, 283 S.E.2d 732, 739 (1981), *cert. denied*, — U.S. —, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). However, we do not believe that defendant's evidence adequately authorized the submission of the instruction he did request which used the terms "relatively low mentality." In this regard, the psychiatrist testified that defendant's "other tests indicated that his I.Q. was probably a little higher than [66] and fell at least into the *low-normal range of intelligence*." Although we are not schooled in the medical art of psychiatry, we think that one would not commonly understand low to normal intelligence to be reasonably synonymous with relatively low mentality. Consequently, we hold that the trial court did not err in refusing to instruct the jury in this respect. In any event, the omission could not have possibly been prejudicial since the trial court told the jury it could evaluate "[a]ny other circumstances or circumstances arising from the evidence which you, the jury deem to have mitigating value." G.S. 15A-2000(f)(9).

[61, 62] For similar reasons, we reject defendant's contention that the trial court erred in not instructing upon a statutory mitigating circumstance *sua sponte*. The evidence simply did not support the submission of G.S. 15A-2000(f)(2). The psychiatrist testified that defendant had "psychological problems" and was "a very passive person that exhibits *some* chronic depression in terms of how he functions in life." He also stated that defendant was "not basically a violent person" and that there was no evidence "that he was an angry acting out type person that you ordinarily find in people that are prone to violence." On cross-examination, the psychiatrist further explained the results of his examination of defendant as follows:

> I also found no evidence of any thought disorder. I found his memory to be adequate and his perception to be adequate. I found that he was always oriented as the time, place and person. I would classify his depression as *mild* depression. I believe that part of his depression would be caused by the incarceration and facing two charges of murder in the first degree. I did not find any evidence of the type of anger that you normally find in people of these subculture groups.

Record at 283-86 (emphasis added). This evidence did not, in our opinion, sufficiently show that defendant was somehow *under the influence* of a mental or emotional disorder *at the time* he committed the murders. We also have serious doubts as to whether "some" "mild" "chronic depression" qualifies as a bona fide mental or emotional disturbance under our capital punishment statute. *Compare State v. Taylor*, *supra* (evidence that defendant had "paranoid psychosis"); *State v. Rook*, *supra* (psychiatrists gave direct opinions that defendant had a mental disorder or illness); *State v. Johnson*, *supra* (defendant was di-

agnosed as schizophrenic). Again, even assuming that the trial court should have instructed upon G.S. 15A-2000(f)(2), its failure to do so did not constitute prejudicial error since the jury could have elected to consider this factor pursuant to the trial court's instruction upon G.S. 15A-2000(f)(9).

XII.

The trial court submitted each of the two killings as an aggravating circumstance for the other under the "course of conduct" provision of G.S. 15A-2000(e)(11).[13] Defendant argues that this kind of reciprocal aggravation to enhance his punishment for both crimes constituted double jeopardy and deprived him of due process of law.[14] For a precise understanding of the issue raised by defendant, we quote from his brief as follows:

> In summary, the defendant's claim in this case ... is that the prosecution faced with two homicides committed by the same person in the same "course of conduct" must choose between two options. The prosecution may use one of the homicides as an aggravating circumstance under § 15A-2000(e)(11) to support the increased penalty of death for the other. The prosecution may seek a separate conviction for each of the homicides, in which case a death penalty for either must be based on aggravating factors that do not include the other homicide. The double jeopardy clause prohibits the prosecution from using both options, i.e., from obtaining a substantive conviction for a homicide and then using it again as an aggravating circumstance under § 15A-2000(e)(11) to support punishment by death for the other killing. Defendant's Supplemental Brief at 4.

To the contrary, we find no constitutional authority mandating a conclusion by us that the submission of G.S. 15A-2000(e)(11) in aggravation of both murders violated defendant's protection against double jeopardy, and we decline to adopt a position which would prevent the administration and availability of equal justice for equal crimes.[15]

[63] In the instant case, defendant killed two persons at the same place and within minutes of each other. The capital charges were tried together pursuant to defendant's own motion for joinder. The jury found defendant guilty of murder in the first degree, upon the theory of premeditation and deliberation, on both counts. The State was thereupon entitled to seek the death penalty for each murder, and it properly did so. The State sought the death penalty based upon the aggravating circumstances of *both* G.S. 15A-2000(e)(9) and (11). The jury found that these aggravating circumstances outweighed the mitigating beyond a reasonable doubt and recommended the death penalty in each case. There was no constitutional error in the procedure employed.

[64] The cases principally relied upon by defendant are clearly inapposite, and the reasoning of those cases simply cannot be stretched to encompass the imaginative and innovative standard of double jeopardy which defendant seeks to impose at *the initial sentencing hearing jointly held upon dual capital convictions.* For example, both the United States Supreme Court's decision in *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), and the decision of this Court in *State v. Silhan*, 302

13. G.S. 15A-2000(e)(11) lists the following factor for the jury's consideration: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons."

14. Defendant's motion to file a supplemental brief on this question was allowed by the Court on 8 March 1982. We shall address defendant's contentions as they are presented in that amplified brief.

15. We reach the same conclusion in another death penalty case filed by our Court today: *State v. Williams (II)*, — N.C. —, 292 S.E.2d 243 (1982). In *Williams (II)*, the defendant was tried separately in two counties for two murders. Each murder was submitted as reciprocal aggravation for the other under G.S. 15A-2000(e)(11) at defendant's separate trials. *See State v. Williams (I)*, 304 N.C. 394, 284 S.E.2d 437 (1981).

N.C. 223, 275 S.E.2d 450 (1981), addressed the double jeopardy implications which arise in the event a new trial or a new sentencing hearing is required in a capital case after the jury has already decided the punishment issue either for or against the defendant. Such is plainly not the situation here, and we need not search out hidden nuances of the double jeopardy clause in order to decide the case before us. It is sufficient to recognize that the thrust of the concept of double jeopardy is that a defendant may not be unfairly subjected to multiple prosecutorial attempts to obtain a conviction or a certain penalty for the same offense nor may a defendant receive multiple punishment for the same offense. *See Bullington v. Missouri, supra; State v. Silhan, supra.*

[65] Regardless of the formula utilized, the jury's *consideration* of a defendant's commission of "other crimes of violence," in making its ultimate penalty recommendation for that defendant's conviction of a related but separate capital offense, is not logically equivalent to the defendant receiving multiple punishment for the same crime. This is especially true where, as here, the prosecution relies on an additional aggravating circumstance which is also subsequently found by the jury. In short, the principle of double jeopardy has not evolved, as defendant argues, to the point that it prevents the prosecution from relying, at the sentencing phase of a capital case, upon a related course of criminal conduct by the defendant as an aggravating factor to enhance the punishment of defendant for another distinct offense, and this is so, irrespective of whether the defendant was also convicted of another capital charge arising out of that very same course of criminal conduct and subjected to separate punishment therefor. *See, e.g., State v. Hutchins*, 303 N.C. 321, 347, 279 S.E.2d 788, 804 (1981) (reciprocal aggravation of two first-degree murders under G.S. 15A-2000(e)(11)). *See also State v. Cherry*, 298 N.C. 86, 113, 257 S.E.2d 551, 568 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (discussing the use of an underlying felony, which accompanies the commission of a premeditated murder, as an aggravating circumstance under G.S. 15A-2000(e)(5)).

In conclusion, we hold that the enhancement of defendant's penalty on the one hand for Pachaco's murder did not result in an unconstitutional duplication of defendant's penalty on the other hand for Ausley's death, and vice versa, simply because defendant's overall violent conduct was submitted in aggravation on each hand under G.S. 15A-2000(e)(11). It is the very fact that defendant killed two people, and not just one, that aggravates the nature of his crimes, and it was entirely proper for the jury to consider this fact in determining whether defendant should pay the ultimate price for *each* life he took.

XIII.

[66] Defendant assigns error to the trial court's direction to the jury that it need not specify which mitigating circumstances on the written list it found. This same issue was recently addressed at length in *State v. Rook*, where we stated: "While defendant makes a good argument that it is the better practice, and we agree, to require the jury to specify mitigating factors found and not found for the benefit of this Court in reviewing the appropriateness of the death penalty, we find no such requirement in our statutes." 304 N.C. 201, 231, 283 S.E.2d 732, 751 (1981), *cert. denied*, ——— U.S. ———, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982). Moreover, in *State v. Taylor*, we also found "no merit in defendant's contention that since the jury had to answer each aggravating circumstance specifically but did not have to answer which mitigating circumstances they found, that placed undue emphasis on the aggravating circumstances." 304 N.C. 249, 285, 283 S.E.2d 761, 783 (1981). It suffices to say that defendant's similar contentions must be overruled pursuant to the binding authority of both *Rook* and *Taylor*.

XIV.

Both the prosecutor and the trial court advised the jury that it had a *duty* to

recommend a sentence of death if it found three things: (1) that one or more statutory aggravating circumstances existed; (2) that the aggravating circumstances were substantial enough to warrant the death penalty; and (3) that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. On the other hand, the jury was also advised that it had the duty to recommend a sentence of life imprisonment if it did not find any one of those three things. These directions to the jury were based upon the statutory criteria set forth in G.S. 15A-2000(b) and (c) and conformed to the N.C. Criminal Pattern Jury Instructions § 150.10 (1980).[16]

Nevertheless, defendant assigns error to the foregoing on the basis that such instructions "prejudicially withdrew from the jury its final option ... to recommend a life sentence notwithstanding its earlier findings." Defendant's Brief at 75. This assignment lacks merit.

[67, 68] The jury had no such option to exercise unbridled discretion and return a sentencing verdict wholly inconsistent with the findings it made pursuant to G.S. 15A-2000(c). The jury may not arbitrarily or capriciously *impose or reject* a sentence of death. Instead, the jury may only exercise guided discretion *in making the underlying findings* required for a recommendation of the death penalty within the "carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused." *State v. Johnson*, 298 N.C. 47, 63, 257 S.E.2d 597, 610 (1979); *see State v. Barfield*, 298 N.C. 306, 349-52, 259 S.E.2d 510, 541-43 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). Moreover, defendant's contention was implicitly answered in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), in which this Court overruled an assignment of error alleging that the trial court had erred in failing to instruct the jury that it could still recommend life imprisonment even though it found that the aggravating circumstances outweighed the mitigating ones. Justice Britt, speaking for the Court in *Goodman*, explained that:

> [I]t would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and impose the sanction of death at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it.

Id. at 35, 257 S.E.2d at 590. For these reasons, we hold that the jury was correctly informed that it had a duty to recommend a sentence of death if it made the three findings necessary to support such a sentence under G.S. 15A-2000(c).[17]

XV.

The trial court instructed the jury upon the statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the murders were "especially heinous, atrocious, or cruel." Defendant essentially contends that the evidence did not support the existence of this factor and that the trial court's instruction upon it thus violated the Eighth Amendment.

[69] In accordance with the dictates of the Eighth Amendment, our Court has ad-

16. Similar instructions about the jury's duty to return a certain sentencing verdict, based upon its affirmative findings under G.S. 15A-2000(c), were given in three other death cases previously decided by our Court, in which no corresponding exception or assignment of error was raised on appeal: *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, ___ U.S. ___, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); and *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982).

17. There is no constitutional infirmity in such an instruction. *See, e.g. Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (cited in the dissent).

hered to the position that the aggravating circumstance of G.S. 15A-2000(e)(9) "does not arise in cases in which death was immediate and in which there was no unusual infliction of suffering upon the v' im." *State v. Rook*, 304 N.C. 201, 226, 283 S.E.2d 732, 747 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *see Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see, e.g., State v. Hamlette*, 302 N.C. 490, 504, 276 S.E.2d 338, 347 (1981) (submission of G.S. 15A-2000(e)(9) was erroneous). Instead, our Court has made it clear that the submission of G.S. 15A-2000(e)(9) is appropriate only when there is evidence of excessive brutality, beyond that normally present in any killing, or when the facts as a whole portray the commission of a crime which was conscienceless, pitiless or unnecessarily tortuous to the victim. *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979); *see, e.g., State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, —— U.S. ——, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981). It is, therefore, plain that an issue concerning the propriety of the submission of this aggravating factor is resolved according to the peculiar surrounding facts of the capital case under consideration.

[70] Examining the case at bar, we hold that there was sufficient evidence whereby the jury could have reasonably concluded that the murders of Pachaco and Ausley were especially despicable and wanton under G.S. 15A-2000(e)(9). The evidence showed that defendant carefully executed a deliberate and premeditated plan for murder. We have already set out the details of the murders at length in the beginning of the opinion, and it would be repetitious to summarize them again here. It suffices to say that the deaths of the unsuspecting victims were not instantaneous and that both killings involved the infliction of unusual physical or psychological torture. Each victim essentially witnessed (or heard) the shooting of the other and was helpless to prevent this unprovoked horror. The killing of Pachaco was excessively brutal in that defendant, having already shot him once, walked over to where he lay moaning on the floor and shot him again at point blank range. The killing of Ausley was merciless and conscienceless in that defendant shot him as he begged and pleaded for his life. Defendant seemed to enjoy the killings, and he showed no remorse for what he had done at that time. In fact, defendant callously evaluated his conduct in his subsequent announcement to his companions that he had "just blown away two dudes." Viewing the circumstances of the murders as a whole, we hold that the trial court correctly instructed the jury upon G.S. 15A-2000(e)(9).

XVI.

The sentence of death in a given case cannot be "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." G.S. 15A-2000(d)(2). Defendant argues that the infliction of the death penalty for these murders would be excessive and disproportionate punishment. We disagree. All things considered, we cannot say, *as a matter of law*, that this defendant is somehow less deserving of capital punishment than the other occupants of death row. *See, e.g., State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981); *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, —— U.S. ——, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). The facts of the instant case speak for themselves and we shall not disturb the factual findings made by the jury under G.S. 15A-2000(c) in reaching its recommendations for the death penalty in this case.

[71, 72] Within this argument, defendant also urged this Court to adopt several

procedures to assist appellate review of the proportionality of the death sentence in a particular case. It would serve no useful purpose to address each suggestion here. Instead, we believe that all of the matters raised by defendant are adequately answered by our two-fold determination that: (1) the review mandated by G.S. 15A-2000(d)(2) (*supra*) provides a sufficient constitutional safeguard against the unconstitutional imposition of cruel and unusual punishment, and (2) the intended *ultimate* emphasis of proportionality review under G.S. 15A-2000(d)(2) is upon the independent consideration of the individual defendant and the nature of the crime or crimes which he has committed.

XVII.—XIX.

[73-75] The final three "arguments" presented by defendant's appellate counsel ask us to re-examine the constitutional validity of several prior cases without advancing a single good, logical or compelling reason for doing so. Such spurious disputations lack merit, do not warrant discussion and are not well received. Even so, we shall take this opportunity to reaffirm today the constitutionality of the following aspects of our capital sentencing procedure: (1) the bifurcated trial proceedings of G.S. 15A-2000, in which the same jury determines both the guilt and punishment issues, and the use of challenges for cause to excuse therefrom prospective jurors who are unequivocally opposed to the death penalty; (2) the submission of the sufficiently clear statutory aggravating circumstance of G.S. 15A-2000(e)(9), that the capital felony is "especially heinous, atrocious, or cruel," in appropriate cases; and (3) the placement of the burden upon the defendant of persuading the jury, by a preponderance of the evidence, that a particular mitigating circumstance exists. *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982); *State v. Avery*, 299 N.C. 126, 261 S.E.2d 803 (1980) (and cases cited in part I of the opinion, *supra*); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980); *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597 (1979); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979).

XX.

The decision to take a life pursuant to the law, for the life of another, or others, wrongfully taken, is a very grave and solemn matter. Thus, this Court accords the utmost diligence and care in its review of capital cases. In the instant case, we have fully considered all of the arguments in defendant's brief, which encompassed the multitudinous assignments of error and exceptions in the record on appeal. We are convinced that both phases of defendant's trial were competently conducted without the accompaniment of constitutional defect or prejudicial error, and we so hold.

We also hold that the judgments of death were lawfully imposed. The evidence supported submission of the aggravating circumstances listed in G.S. 15A-2000(e)(9) and (11). There is no indication that the jury recommended capital punishment under the influence of passion or prejudice. Finally, the penalties imposed do not seem excessive or disproportionate considering the premeditated and callous manner in which defendant calmly shot and killed two people in cold blood, suddenly and without any provocation by them, for reasons exhibiting a wanton disregard for human life. Indeed, the record impels the conclusion that justice has been done in every respect. In sum, we have no authority or cause to disturb the duly entered judgments of death.

NO ERROR.

MITCHELL, J., did not participate in the consideration or decision of this case.

CARLTON, Justice, concurring.

I concur with the majority opinion. However, I wish to add that I agree with the views expressed by Justice Exum in section V. of his dissenting opinion. In my opinion, the comparison pool for proportionality review for first degree murder cases

should include all cases tried under the present death penalty statute which have been affirmed on appeal by this Court, regardless of the punishment imposed. I think it is time for this Court to address this issue.

BRANCH, C. J., joins in this concurring opinion.

EXUM, Justice, dissenting as to sentence.

I.

I find myself, first, in strong disagreement with the majority on an extremely important new question dealing with the construction of our death penalty statute. The majority holds, after somewhat cursory treatment and a barebones analysis, that under the statute, G.S. 15A-2000, if the jury finds: (1) the existence of one or more statutory aggravating circumstances, (2) that the aggravating circumstance(s) so found are sufficiently substantial to call for the death penalty and (3) the aggravating circumstance(s) outweigh the mitigating circumstances, then the jury *must* return the death penalty. Nowhere, of course, does the statute so provide. The majority construes the statute in this way on the sole ground that otherwise the statute would be subject to the constitutional attack that a jury could decide between life and death in its unbridled discretion. Yet decisions of the United States Supreme Court, none of which are mentioned in the majority's discussion, have made it abundantly clear that the majority's interpretation is not constitutionally required.

In one of its first cases construing our death penalty statute, this Court noted, "[t]he first maxim of statutory construction is to ascertain the intent of the legislature. To do this, this Court should consider the statute as a whole, the spirit of the statute, the evils it was designed to remedy, and what the statute seeks to accomplish." *State v. Johnson*, 298 N.C. 47, 56, 257 S.E.2d 597, 606 (1979). In *Johnson*, this Court recognized that our death penalty statute was enacted following a quintet of cases all decided by the United States Supreme Court on 2 July 1976. These cases struck down mandatory death penalty statutes in North Carolina, *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) (plurality opinion), and Louisiana, *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) (plurality opinion), but sustained death penalty statutes which, in varying degrees, sought to control the discretion exercised in capital sentencing in Georgia, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion); Florida, *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion); and Texas, *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (plurality opinion). This Court noted in *Johnson* that these five cases "made clear that neither unbridled, unguided discretion *nor the absence of all discretion* in the imposition of the death penalty is constitutionally permissible." 298 N.C. at 58, 257 S.E.2d at 607 (emphasis supplied). After further discussion of United States Supreme Court decisions and various provisions of the Model Penal Code, upon which our statute was largely based, this Court concluded in *Johnson*, 298 N.C. at 63, 257 S.E.2d at 610:

> In summary, there are a number of controlling factors governing the interpretation of our death penalty statute. Unbridled discretion in the imposition of the sentence is not permitted. On the other hand, sentencing juries must have some discretion to determine in a rational and consistent manner those cases in which the death penalty should be imposed. Juries are to be guided in this process by a carefully defined set of statutory criteria that allow them to take into account the nature of the crime and the character of the accused. Thorough jury instructions, which incorporate and reflect the definitions accorded to these criteria and which are fully applied to the facts of each case, must be given. In each case the process must be directed toward the jury's having a full understanding of both the relevant aggravating and mitigating factors and the neces-

sity of balancing them against each other in determining whether to impose the death penalty. Lastly, any imposition of the death penalty by the jury should be searchingly reviewed by the appellate courts to insure the absence of unfairness, arbitrariness or caprice in the result.

Regarding the question before us, the statute, G.S. 15A-2000, provides in pertinent part as follows:

(b) Sentence Recommendation by the Jury.—... In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury *that it must consider* any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, *the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters*:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) *Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.*

....

(c) Findings in Support of Sentence of Death.—*When the jury recommends sentence of death*, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

[Emphases supplied.]

In essence, then, the statute provides that in determining whether to impose death or life imprisonment the jury "must consider" certain aggravating and mitigating circumstances; that the jury's sentence recommendation shall be "based upon" the sufficiency of the aggravating circumstance(s) and the mitigating circumstance(s) and their relative weights; and that "when the jury recommends a sentence of death," it must sign a writing in which three questions are answered affirmatively and unanimously beyond a reasonable doubt.

From this statutory scheme the legislative intent clearly emerges. The legislature has sought to strike a balance between fairness to the individual defendant and consistency among the cases in which the death penalty is imposed. It has designed a statute which avoids the two extremes of mandatory death penalties or unbridled discretionary action by juries. The legislature intended for the jury to consider: first, the sufficiency of the aggravating circumstance(s); second, whether any mitigating circumstance(s) exist which outweigh the aggravating circumstance(s); and third, based on these considerations whether to recommend a death sentence or life imprisonment. *Only when the jury determines to recommend death* is the jury required to sign a writing which shows its affirmative, unanimous findings that one or more statutory aggravating circumstances exist beyond a reasonable doubt, that they are sufficiently substantial to make the death penalty appropriate and that the mitigating circumstances do not outweigh the aggravating circumstances.[1] Subsection (b)

1. Although the jury is not required by statute to answer these questions *unless* they recommend death, I believe documentation of the

states in two places that the jury's sentence recommendation is to be *based* on these considerations, not decreed by them. There is nothing in this scheme to suggest a legislative intent *to require* the jury to return a sentence of death even if it should answer the three crucial subsection (c) issues affirmatively, just as there is nothing in the statute which permits a jury to ignore the delineated considerations in its deliberations. To hold, as does the majority, that if affirmative answers in writing to these three issues are prerequisite to a jury's recommendation of death, then death *must* be recommended when the prerequisites are met is, logically, a *non sequitur*.

This logical trap is easily sprung; it caught me in my dissent in *State v. Rook*, 304 N.C. 201, 283 S.E.2d 732 (1981), *cert. denied*, ---- U.S. ----, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982), where I lapsed into the same fallacy now being urged by the majority.[2] In *Rook*, however, both my dissent and the majority opinion were addressing a different question, *i.e.*, whether the jury was required to specify which mitigating factors it found to exist. The question now being addressed was not raised in *Rook*, and any conclusion about it was not necessary to the dissent. With the benefit of briefing, argument and my own research, I am convinced that my initial conclusion on the point here in issue, as I expressed it in *Rook*, was wrong, just as I believe the majority's similar conclusion is wrong. The conclusion is not less a *non sequitur* because I once subscribed to it.

Our trial judges initially properly construed the statute to mean that if the jury answered the three issues affirmatively it could, but was not required to, recommend the death penalty. The first Pattern Jury Instruction promulgated after the statute provided that if the jury answered the crucial issues affirmatively then it "*may* recommend the death penalty." N.C.P.I.Crim. 150.10, p. 5 (June 1977) (emphasis supplied). A subsequent revision of the instruction emphasized this point by providing that the jury "*may*, although [it] need not, recommend that the defendant be sentenced to death." N.C.P.I.Crim. 150.10, p. 4 (Replacement, May 1979). These instructions, or a variation of them, have been followed in a large number of death penalty cases.[3]

jury's findings in every capital sentencing proceeding, whether they recommend death or life, is necessary for this Court's use in conducting its proportionality review required under G.S. 15A-2000(d)(2).

2. In *Rook*, *supra*, I wrote:

> Indeed, in Georgia, the jury may return a death sentence upon finding one or more aggravating circumstances, no matter how it regards the mitigating circumstances. In contrast, under our statute the jury may return a death sentence recommendation only if it finds: (1) the existence of one or more aggravating circumstances; (2) that the aggravating circumstance(s) found by it are sufficiently substantial to call for the imposition of the death penalty; and (3) that *the mitigating circumstances are insufficient to outweigh the aggravating circumstances*. The clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances.

304 N.C. at 242-43, 283 S.E.2d at 757 (emphasis original) (footnote omitted).

3. *See, e.g., State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981) (R. at 192, "you may recommend death"); *State v. Detter*, 298 N.C. 604, 260 S.E.2d 567 (1979) (R. at 238, "you may recommend"); *State v. Johnson*, 298 N.C. 355, 259 S.E.2d 752 (1979) (R. at 111, "you may recommend"); *State v. Spaulding*, 298 N.C. 149, 257 S.E.2d 391 (1979) (R. at 333, "Based upon these considerations as instructed by the court, you will advise the court whether the defendant should be sentenced to life imprisonment or death"); *State v. Cherry*, 298 N.C. 86, 277 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 100 S.Ct. 2165, 64 L.Ed.2d 796 (1980) (R. at 341, "Based upon these considerations as instructed by the Court, you will advise the Court whether the defendant should be sentenced to life imprisonment or death"); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979) (R. at 185, "you may then recommend the death penalty"); *State v. Jones*, 296 N.C. 495, 251 S.E.2d 425 (1979) (R. at 276, "you may—but are not compelled to—recommend the death penalty").

Other cases reviewed by this Court have contained instructions which went even further in telling the jury that the death sentence was not mandated by affirmative answers to the crucial issues. For example, in *State v. Oliver*, 302

After our decision in *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979), the Pattern Jury Instruction for our trial judges was changed so as to provide that if the jury answered the three issues affirmatively, it would be its "duty to recommend that defendant be sentenced to death." N.C.P.I. Crim. 150.10, pp. 3–4 (Replacement, May 1980). The case cited in support of this change in the instruction is *Goodman*.

The issue in *Goodman*, however, was not whether the jury should be told it has a "duty" to recommend the death penalty if it answers the three issues affirmatively and unanimously. The issue in *Goodman* was whether, as the defendant contended, the trial court "should have explained to the jury that it had the option of returning a recommendation of life imprisonment even if aggravating circumstances were found to outweigh mitigating circumstances." Brief for Defendant Appellant at 15–16. Defendant argued that "[i]t should be incumbent upon the trial Court to explain in detail that no mandatory recommendation of the death penalty is required regardless of findings as to aggravating and mitigating circumstances set forth in the statute." *Id.*

Thus, defendant Goodman was arguing that the trial court should be required to *explain* to the jury that it could, in effect, *ignore* the considerations which by statute it must consider in recommending a life or death sentence. This goes far beyond the permissive instruction actually given and upheld in *Goodman, i.e.*, the instruction that if the jury answered the three subsection (c) issues affirmatively and unanimously, it "may then recommend the death penalty." (R. at 185).

The state's brief in *Goodman* recognizes that "the Court left the jury with the understanding that, even should they find more aggravating than mitigating circumstances, they could still recommend life imprisonment.... At no point did the Court state that the jury could not recommend life imprisonment when the aggravating circumstances outweighed the mitigating. What the Court was saying was that (even where such aggravating circumstances appeared to be more substantial than mitigating circumstances) the jury could still recommend life imprisonment." Brief for the state at 19–20.

The Court in *Goodman* answered the defendant's argument as follows, 298 N.C. at 34–35, 257 S.E.2d at 590:

> His argument is that without such instruction the jury will mathematically balance the two types of factors against each other and will impose the death penalty whenever aggravating circumstances outnumber mitigating ones. We do not agree that this is the manner in which a jury will reach its decision on this important question or that the instruction for which defendant contends is required by our statute.
>
> It must be emphasized that the deliberative process of the jury envisioned by G.S. 15A–2000 is not a mere counting process. *State v. Dixon, supra* [283 So.2d 1, Fla.]; *State v. Stewart, supra* [197 Neb. 497, 250 N.W.2d 849]. The jury is charged with the heavy responsibility of subjectively, within the parameters set out by the statute, assessing the appropriateness of imposing the death penalty upon a particular defendant for a particular crime. *Nuances of character and cir-*

N.C. 28, 274 S.E.2d 183 (1981) (R. at 668), the jury was told:

> Unless you have answered Issues One, Two, Four "yes" you must recommend that a defendant in a given case be sentenced to life. Only if you have answered Issues One, Two and Four "yes" may you recommend that a defendant be sentenced to death. Even then, though, you are not required to do so. You still may recommend life imprisonment. However, if you answered Issues One, Two and Four "yes" you are, on further deliberations, satisfied beyond a reasonable doubt that the only just punishment for this defendant is—a given defendant in a given case, is the death penalty, then you may so recommend it; realizing, of course, the tremendous responsibility which rests on your shoulders when you make that recommendation.

See, also, State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981) (R. at 231, "you would then further deliberate upon your sentence recommendation"); *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980) (R. at 618, "Even though you are not required to do so, you may still recommend life in prison").

cumstance cannot be weighed in a precise mathematical formula.

At the same time, we believe that it would be improper to instruct the jury that they may, as defendant suggests, disregard the procedure outlined by the legislature and *impose the sanction of death* at their own whim. To do so would be to revert to a system pervaded by arbitrariness and caprice. The exercise of such unbridled discretion by the jury under the court's instruction would be contrary to the rules of *Furman* [*v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346] and the cases which have followed it. For these reasons defendant's seventh assignment of error is overruled.

[Emphases supplied.]

The majority's conclusion on this point in the instant case as well as the change in the Pattern Jury Instruction are based on a misreading of *Goodman*. *Goodman* simply recognized that, under the instructions as given, there would be no cause for the jury "mathematically" to balance the aggravating against the mitigating and "impose the death penalty whenever aggravating circumstances outnumber mitigating ones." *Goodman* cautioned that juries should not be instructed in a manner which would cause them to "impose the sanction of death at their own whim." *Goodman* does not support the proposition that a jury has a duty to impose the death penalty whenever it concludes that the statutory aggravating circumstances are sufficiently substantial to call for it and that the mitigating circumstances are insufficient to outweigh the aggravating. *Goodman* recognizes that given such determinations, a jury may yet opt for life imprisonment and notes that there is no way to escape some subjectivity in deciding who shall live and who shall die. Juries are called on in this kind of decision, we said in *Goodman*, to consider "[n]uances of character and circumstance [which] cannot be weighed in a precise mathematical formula."

It is for this reason that a jury ought not be required to return the death penalty simply because it answers the crucial subsection (c) issues affirmatively. Conscientious juries may determine that these issues ought to be answered affirmatively and yet, because of circumstances of the case, "nuances," if you will, not subject to articulation in a statute or a verdict and not perhaps articulable by the jurors themselves, feel impelled to recommend that the death penalty not be imposed.[4] We should not construe our statute to require such a jury, nevertheless, to impose it.

Our statute is designed simply to insure that certain specific (subsection (c)) prerequisites are met before the death penalty is imposed. Its only prerequisites for the imposition of life imprisonment are that the jury base such a decision (subsection (b)) on a weighing against each other of various aggravating and mitigating circumstances which it may find to exist. Although the jury may not recommend death without specifically, and in writing, answering subsection (c) issues affirmatively, even if it does so it may yet recommend life.

The United States Supreme Court has made it quite clear that these kinds of death penalty or life imprisonment decisions do not result in the unbridled discretionary determinations found wanting in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (per curiam). In *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), the Court had

4. Indeed, juries have answered the crucial subsection (c) issues affirmatively and yet either recommended life imprisonment, *State v. King*, 301 N.C. 186, 270 S.E.2d 98 (1980); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979); or were unable unanimously to agree on a sentence, thus requiring the judge to impose a life sentence pursuant to G.S. 15A-2000(b). *State v. Silhan*, 302 N.C. 223, 275 S.E.2d 450 (1981), on resentencing in Columbus Superior Court (Case No. 79CRS1943); *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

At least one jury has found ambiguity in the "Issues and Recommendation as to Punishment" form generally submitted to juries deliberating on sentences in capital cases. *State v. Lake*, 305 N.C. 143, 286 S.E.2d 541 (1981) (copy found in Case No. 80CRS5530, Onslow Superior Court).

before it a Missouri death penalty statute very similar to ours. In *Bullington*, the Supreme Court noted that a Missouri jury "is instructed that it is not compelled to impose the death penalty, even if it decides that a sufficient aggravating circumstance or circumstances exist and that it or they are not outweighed by any mitigating circumstances or circumstances." 451 U.S. at 434–35, 101 S.Ct. at 1855–56. Although the question was not raised, there is no suggestion in *Bullington* that such a statute would be constitutionally infirm.

In *Gregg v. Georgia, supra*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, the Supreme Court considered a Georgia death penalty statute which provided that the jury could return a sentence of death only if it found the existence of one of ten statutorily specified aggravating circumstances. The jury was not required to return a death sentence even if it found the existence of one or more of the ten statutorily specified aggravating circumstances and was "not required to find any mitigating circumstance in order to make a recommendation of mercy." *Id.* at 197, 96 S.Ct. at 2936. On appeal of his death sentence, defendant argued that because a Georgia jury had "the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present," the statute violated the *Furman* prohibition against unbridled discretion. *Id.* 428 U.S. at 203, 96 S.Ct. at 2939. The United States Supreme Court answered by saying:

> This contention misinterprets *Furman* .... Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, *the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.*

428 U.S. at 203, 96 S.Ct. at 2939 (emphasis supplied). In answering defendant's contention that there were other discretionary decisions which could be made in the processing of a murder case which would result in some candidates for the death penalty actually escaping it, the Supreme Court said:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

428 U.S. at 199, 96 S.Ct. at 2937. Mr. Justice White, joined by the Chief Justice and Mr. Justice Rehnquist, said in a concurring opinion in *Gregg*:

> The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy *on the basis of factors too intangible to write into a statute*, and I cannot accept the naked assertion that the effort is bound to fail.

428 U.S. at 222, 96 S.Ct. at 2947 (emphasis supplied).

Finally, in *Jurek v. Texas, supra*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929, the Supreme Court considered a Texas statute which required the jury to impose the death sentence if it answered three questions affirmatively.[5] The attack made on the Tex-

5. The questions are these:
(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the de-

as statute was that it created a mandatory death penalty in violation of the principles laid down in *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944, and *Roberts v. Louisiana*, *supra*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974. The Supreme Court struggled with this question because the Texas statute appeared to have no provision for the jury to consider mitigating circumstances. "Thus," the Court said, "the constitutionality of the Texas procedure turns on whether the enumerated questions allow consideration of particularized mitigating factors." 428 U.S. at 272, 96 S.Ct. at 2956. The Court concluded that the jury's consideration of mitigating circumstances, under the interpretation given the second question by the Texas Court of Criminal Appeals, was encompassed in its decision on that question. *See supra* note 5. Therefore, the Court concluded that the statute was not subject to the "mandatory death sentence" attack.

Apparently under the rationale of *Jurek*, the majority's interpretation of our statute would pass constitutional muster. But I am satisfied that the interpretation for which I argue is more solidly supported in the decisions of the United States Supreme Court; whereas the majority's view, which could be supported only by *Jurek*, is at least constitutionally suspect.

Assuming that we are free under the United States Constitution to opt for either interpretation, we should adopt the one which most nearly comports with the legislature's intent as that intent is revealed in the plain words of the statute. The legislature has developed a statutory scheme designed to accommodate the twin "goals of measured, consistent application and fairness to the accused." *Eddings v. Oklahoma*, ___ U.S. ___, ___, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, 8 (1982). In *Goodman*, *supra*, 298 N.C. 1, 257 S.E.2d 569, we held that instructions which, in effect, explained to the jury that it could ignore the procedure devised by the legislature were not authorized by our statute and would be contrary to the *Furman* standards. Likewise, instructions that tell the jury they *must* impose the death penalty if they answer certain questions affirmatively and unanimously are not authorized by our statute and fail to give appropriate weight to inarticulable, intangible "[n]uances of character and circumstances." *State v. Goodman*, *supra*, 298 N.C. at 34, 257 S.E.2d at 590.

Our statute, like the Supreme Court said of its decision in *Lockett*,[6] "is the product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Eddings v. Oklahoma*, *supra*, ___ U.S. at ___, 102 S.Ct. at 874, 71 L.Ed.2d at 8. Both the instructions disapproved in *Goodman* and those given in the instant case upset the statute's finely tuned balance between consistency and sensibility to the uniqueness of an individual. The instruction sought by the defendant in *Goodman* tilts too much in favor of individualized consideration at the expense of consistency; whereas the instruction given here tilts too much in favor of consistency at the expense of individualized consideration.

The instruction most in keeping with the legislative design and which ought to be given in all cases is that recommended by the Superior Court Judges' Pattern Jury Instruction Committee in May 1979. In that instruction jury members are told that if they answer the crucial issues affirmatively and unanimously, "you may, although you need not, recommend that the defendant be sentenced to death." N.C.P.I.Crim. 150.10 at 4.

II.

At least two jurors were excluded for cause in the instant case in violation of the

ceased was unreasonable in response to the provocation, if any, by the deceased.
See 428 U.S. at 269, 96 S.Ct. at 2955 (quoting Tex.Code Crim.Proc., art. 37.071(b) (Supp. 1975-76)).

6. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion).

limitations imposed by *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), an opinion by Mr. Justice Stewart. Some particularly pertinent language of this landmark case bears repeating, 391 U.S. at 519–23, 88 S.Ct. at 1775–77:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it.... [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.... [A] jury composed exclusively of ... people [who believe in the death penalty] cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for [those who believe in the death penalty].
>
> If the State had *excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death*, it could argue that the resulting jury was simply 'neutral' with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle, the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.
>
> ....
>
> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.
>
> ....
>
> To execute [such a] death sentence would deprive him of his life without due process of law. [Footnotes omitted.] [Emphasis supplied.]

Furthermore, *id.* at 522–23 n. 21, 88 S.Ct. at 1771 n. 21,

> a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out ....
>
> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. [Emphasis original.]

The test applicable to this case then, under *Witherspoon*, for excuses for cause on death penalty opposition grounds is that the prospective juror must make it "unmistakably clear" that he or she would "automatically" vote against the death penalty "without regard to any evidence that might be developed at the trial of the case." A juror who has scruples, or reservations, or who is even opposed to capital punishment, but who is not "irrevocably committed, before

the trial has begun, to vote against [it] regardless of the facts and circumstances" that might be brought out at trial, may not be excused for cause. Neither may a juror who states merely that he or she has "'a fixed opinion against' capital punishment" or that he or she does not "'believe in' capital punishment" be excused for cause, because such juror may yet "be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." *Boulden v. Holman*, 394 U.S. 478, 483–84, 89 S.Ct. 1138, 1141–42, 22 L.Ed.2d 433 (1969). Jurors may be excused for cause, however, if their opposition to the death penalty is so strong that they cannot take an oath to "follow the law" in trying the case. *Lockett v. Ohio*, 438 U.S. 586, 595–96, 98 S.Ct. 2954, 2959–60, 57 L.Ed.2d 973 (1978) (plurality opinion).

The United States Supreme Court's latest decision applying *Witherspoon* is *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). In *Adams* the Court made it clear that *Witherspoon* must be followed even under post-*Furman* guided discretion capital sentencing procedures. *Adams* held that because of *Witherspoon* limitations jurors may not be excused for cause on the ground that their opposition to the death penalty might "affect" their deliberations on issues of fact which might arise in the case.[7] The Court said, 448 U.S. at 46–47:

> [A] Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the 'guided jury discretion,' 577 S.W.2d, [717] at 730, permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*.

It said, further, 448 U.S. at 49–50, 100 S.Ct. at 2528–29, that jurors were improperly excluded

> who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be 'affected.' But neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.

If only one juror is excused for cause, in violation of *Witherspoon* limitations, a sentence of death cannot stand. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976) (per curiam). The *Davis* Court noted, 429 U.S. at 123, 97 S.Ct. at 399:

> Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings,' 391 U.S. at 522 n. 21 [88 S.Ct. at 1777 n. 21], he cannot be excluded; if a venire-

7. *See supra* note 5 and accompanying text.

man is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

This Court held in *State v. Bernard*, 288 N.C. 321, 325, 218 S.E.2d 327, 330 (1975), that a juror could not be excused merely because "he *thought* he would automatically vote against the imposition of the death penalty regardless of the evidence." (Emphasis original.)

Finally, the meaning of the voir dire colloquy is that which would be given it by the prospective juror rather than one trained in the law. "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." *Witherspoon v. Illinois*, *supra*, 391 U.S. at 515–16 n. 9, 88 S.Ct. at 1773 n. 9 (quoted with approval in *Boulden v. Holman*, *supra*, 394 U.S. at 481–82, 89 S.Ct. at 1140).

Turning now to the challenges for cause here under attack, I am satisfied that prospective juror Mary Neal was excused for cause on broader grounds than *Witherspoon* permits. Neal, after an extended colloquy with the prosecutor, never expressed any categorical opposition to the death penalty. She simply said that she would have to be absolutely certain of a defendant's guilt before she could vote to impose it. That portion of the colloquy which accurately reflects her attitude is the following:

Q. Do you have any objection to the death penalty?

A. Well, that's a hard question to answer.

Q. Yes, ma'am.

A. I've never been able to answer it like a cut dried thing. It's hard for me, very hard for me to make decisions, I've never been able to make decisions very well. I had someone to help me, but I'm hard to convince too. I almost have to see something before I could really say so. That's the only way I know to answer you.

. . . .

Q. Let me ask that question a different way, Mrs. Neal, if you're a member of this jury and we get to the second part of the trial, that means you've already found him guilty of murder in the first degree in one or both cases, based on the evidence in this case, what happened in this case and based on the law that Judge Walker gives to you, as he tells you the law, if you deem it to be appropriate, could you impose the death penalty?

A. I don't think so, I really don't believe so.

Q. I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, ma'am, that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence?

A. I don't know. I guess if it was proven to me, I guess I could.

Q. If what was proven to you?

A. I would have to be—I would have to absolute know for sure, I mean no doubt whatsoever.

. . . .

Q. As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.

A. Okay, already proven guilty—if I went along with the guilty part, if I decided they were guilty—no, I will not.

Q. You could not impose the death penalty regardless of what the evidence is?

A. I don't believe so.

MR. WANNAMAKER: If your Honor please, we challenge for cause.

THE COURT: I understand, Mrs. Neal. I know this is very difficult for you, but it's necessary to have your candid and frank answers and I thank you for them.

Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL: No, I just don't think so.

At most, Neal's attitude toward the death penalty "affected" her deliberations on the guilt phase of the case in the sense that she would have to be absolutely certain of defendant's guilt. "[P]rospects of the death penalty may affect what [a juror's] honest judgment of the facts will be or what [a juror] may deem to be a reasonable doubt," *Adams v. Texas, supra*, 448 U.S. at 50, 100 S.Ct. at 2529, without the juror's subjection on that ground to a challenge for cause. Neal never "unmistakably" said that she would not impose the death penalty, or that she would "automatically" vote for life imprisonment, regardless of what the evidence might show. She said she didn't "believe" and didn't "think" she could vote for death. She never said, absolutely, that she could or would not. She should not have been excused for cause.

Prospective juror Frank Rogers said, "I don't go for [the death penalty] too much" and "I don't think much of the death penalty." He never said he was categorically opposed to the death penalty. When asked whether he could consider imposing the death penalty, the following occurred:

> A. I can consider, but as I say—
>
> Q. You tell me you would consider it but then you wouldn't do it, is that what you are saying?
>
> MR. HARRISON: Objection.
>
> A. (By witness) I said I would lean toward life imprisonment, if you want me to tell the truth about it, that's what I'm doing.

At that point, the court intervened as follows:

> THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a verdict which would result in the imposition of the death penalty?
>
> MR. ROGERS: That is true.

Thus Rogers did not say that he could or would not impose the death penalty or that he would automatically vote for life imprisonment, regardless of evidence *that might be introduced at the trial.* He said he could not impose it under any circumstances "without hearing any evidence." Obviously, the learned trial judge was attempting to ask Rogers whether he could impose it under any circumstances regardless of what evidence adduced at trial might show, and to one trained in the law that is what the court's question might mean. To Rogers, a layman, the question could mean no more than what the words actually used by the trial judge would ordinarily convey. Roger's position, then, was simply that he could not impose the death penalty until he at least had heard some evidence in the case. The thrust of the entire colloquy seems to be that, depending on what the evidence adduced tended to show, Rogers could consider the death penalty, that he tended to favor life imprisonment, but that he would not convince himself one way or the other without hearing some evidence. Rogers should not have been excused for cause.

III.

The majority concludes that the trial court did not err in refusing to submit both in his instructions and on the written list defendant's "relatively low mentality" as a mitigating circumstance because there was no evidence to support it and, even if there had been supporting evidence, the error could not have been prejudicial. As the majority correctly notes, a defendant's low mentality, if it exists, is "properly considered in mitigation of a capital felony."

I cannot agree with the majority that the evidence does not support defendant's "relatively low mentality" mitigating circumstance. Defendant's psychiatric witness, Dr. Billy Royal, testified that defendant scored 66 on an intelligence test; but, he said, "[w]e felt that his other tests indicated that his I.Q. was probably a little higher than that and fell at least into the low-normal range of intelligence." Apparently the majority concludes that any intelligence quotient which is within a "normal range" cannot be considered by a jury in a capital case unless it is proffered by the defendant

as an absolute score on an intelligence test. The majority concludes that if it is proffered under the label "relatively low mentality," rather than as a raw score, it may not be considered.

I simply cannot subscribe to, nor do I really understand, the distinction drawn by the majority. Any kind of absolute score on an intelligence test, in order to be meaningful to a lay jury or for that matter to lawyers and judges, needs explanation by competent expert testimony. The testimony in this case was that defendant's intelligence was in the "low-normal range." Defendant asked that his "*relatively* low mentality" be submitted as a mitigating circumstance. The evidence supports that he did have a "*relatively* low mentality." It should be for the jury to assess this quality in terms of its mitigating effect. It is not for the court to say that the jury could not, as a matter of law, consider a person's "relatively low mentality" as a mitigating circumstance because the mentality is within the outer limits of "normal." To me, the phrase "relatively low mentality" accords precisely with the evidence which was introduced. A person whose intelligence is in the low-normal range must perforce have a relatively low mentality. Contrary to the majority's conclusion, the terms are synonymous.

Neither on this record am I able to say that not permitting the jury to consider this mitigating circumstance was harmless beyond a reasonable doubt. Not to permit a jury to consider any relevant mitigating circumstance is an error of constitutional dimension. *Eddings v. Oklahoma, supra*, ——— U.S. ———, 102 S.Ct. 869, 71 L.Ed.2d 1; *Lockett v. Ohio, supra*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973. Before we can deem such an error harmless, we must be satisfied "that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); G.S. 15A–1443(b). The burden is upon the state to so demonstrate. *Id.*

Of the ten mitigating circumstances submitted, we know from the record only that the jury found "one or more." We do not know how many beyond one it found. It is possible that the jury found only one mitigating circumstance to exist out of the list of ten. If it did, the failure to submit an additional mitigating circumstance which should have been submitted and which the jury could have found to exist might well have made a difference in the jury's ultimate recommendation. At least I cannot say beyond a reasonable doubt that it would not have made a difference.

The United States Supreme Court has recently recognized that a youthful defendant's mental development is a significant mitigating circumstance. *Eddings v. Oklahoma, supra*, was a capital case in which, under Oklahoma procedure, the sentencing decision was made by the trial judge. The judge, after hearing evidence, found all of three alleged aggravating circumstances to exist beyond a reasonable doubt. He also found that the youth of the defendant (age sixteen) was a mitigating circumstance "of great weight." The trial judge, however, did not believe he could consider "*the fact of this young man's violent background.*" *Id.* at ———, 102 S.Ct. at 873, 71 L.Ed.2d at 7 (emphasis original). For failure of the trial judge to consider this additional mitigating circumstance, the United States Supreme Court set aside the death penalty and remanded for further proceedings. The Court said, *id.* at ———, 102 S.Ct. at 877, 71 L.Ed.2d at 12:

> [J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background *and mental* and emotional *development* of a youthful defendant be duly considered in sentencing. [Emphasis supplied.]

In the case at bar the trial judge's refusal to submit and instruct on defendant's "relatively low mentality" as a mitigating circumstance deprived the defendant of his right to have the jury consider his "mental ... development." The error was not cured by submitting to the jury the catchall language of the tenth mitigating circumstance when it was unaccompanied by any specific instruction relating to the particu-

lar circumstance of defendant's low mentality.

For the foregoing reasons, I vote to vacate the death sentence imposed in this case and to remand for a new sentencing hearing. I concur in the majority's conclusion that there was no prejudicial error in the guilt phase of the case.

V.

This is yet another in a growing number of cases in which a majority of the Court has affirmed the death penalty and in conducting its statutorily mandated "proportionality review" of the death sentence has failed to advise the bar of the manner in which it conducts such a review. The majority, unlike courts in other jurisdictions which have statutes similar to ours, has yet to tell the bar whether its review is based on comparisons with those cases in which the death sentence was imposed at trial and affirmed on appeal, or with those cases in which the jury could have recommended the death penalty but instead recommended life imprisonment and which have been reviewed on appeal, or with cases from some other kind of pool. It is time for the majority to declare itself on this important question, and I urge it to use as a pool for comparison purposes all cases tried under the new death penalty statute, whether the jury recommended death or life imprisonment and which have been reviewed on appeal by this Court.

The statute, G.S. 15-2000(d)(2), requires us to impose a life sentence if we find that a death sentence imposed by the trial court "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." This language is identical to language in Georgia's death penalty statute. *See* Ga.Code Annot. § 27-2537(c)(3) (1978). The Georgia Supreme Court looks to all appealed murder cases, whatever the sentence imposed, in making its comparisons. *Ross v. State*, 233 Ga. 361, 365-66, 211 S.E.2d 356, 359 (1974), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3222, 49 L.Ed.2d 1217 (1976).[8] In sustaining the Georgia death penalty statute, the United States Supreme Court relied on the Georgia Supreme Court's proportionality review safeguard. Of it, the United States Supreme Court said in *Gregg v. Georgia*, *supra*, 428 U.S. at 206, 96 S.Ct. at 2940:

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. *If a time comes when juries generally do not impose the death sentence in a certain kind of murder case*, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death. [Emphasis supplied.]

The Florida Supreme Court in conducting its proportionality review also compares all appealed murder cases, including those where a sentence less than death was imposed. It has concluded that ignoring life sentences imposed in factually similar cases would make its review procedure constitutionally defective. *McCaskill v. State*, 344 So.2d 1276 (Fla.1977) (per curiam).

The plain words of our statute require that we compare the case before us not only with similar cases in which the death penalty has been imposed but with similar cases in which the jury was permitted to consider it but decided instead to recommend life imprisonment. The basic purpose of proportionality review is to make sure that the death sentence in the case before us is not "excessive" to sentences "imposed in similar cases." If we look for comparison only to cases in which the death penalty has been imposed, the sentence in the case under review could never be excessive because one death sentence never "exceeds" another. It is only by comparing the case being reviewed in which a death sentence was imposed with other similar cases in which life was imposed that we can determine wheth-

8. The Georgia Supreme Court also noted "that nothing in the statute forecloses this court during the course of its independent review from examining non-appealed cases and cases in which the defendant pleaded guilty to a lesser offense." *Ross v. State*, *supra*, 233 Ga. at 365, 211 S.E.2d at 359.

'er the death penalty in the case being reviewed is really excessive to the penalty being imposed in similar cases. For, to reiterate what the Supreme Court said in *Gregg v. Georgia*, *supra*, if there are certain kinds of murder cases in which our juries are generally not recommending death, then an occasional death sentence imposed in those kinds of cases ought to be set aside by this Court.[9]

We ought not limit ourselves only to cases where the death sentence was imposed and affirmed. To do so means that we only ask whether the case under review is as bad as the other death cases. The legislature intended us not only to make that determination but also to determine whether the case under review is more deserving of the death penalty than similar cases in which life sentences have been imposed. The statute's plain language requires that we make both kinds of comparisons. Of the two, the latter is the more meaningful and is probably constitutionally required.

Further, by using only other death sentence cases affirmed on appeal, the Court severely limits the pool of cases available for comparison. Since the effective date of our capital punishment statute, 7 June 1977, there have been only six such cases. *See State v. Taylor*, 304 N.C. 249, 283 S.E.2d 761 (1981); *State v. Rook*, *supra*, 304 N.C. 201, 283 S.E.2d 732; *State v. Hutchins*, *supra*, 303 N.C. 321, 279 S.E.2d 788; *State v. Martin*, 303 N.C. 246, 278 S.E.2d 214, *cert. denied*, —— U.S. ——, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); *State v. McDowell*, 301 N.C. 279, 271 S.E.2d 286 (1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1731, 68 L.Ed.2d 220 (1981); *State v. Barfield*, 298 N.C. 306, 259 S.E.2d 510 (1979), *cert. denied*, 448 U.S. 907, 100 S.Ct. 3050, 65 L.Ed.2d 1137 (1980). The statute requires that we compare factually "similar" cases. Similar cases for comparison purposes are simply not present in such a small sampling. The Court should want to expand, rather than restrict, the pool of cases so that truly similar cases will be more quickly available and we can begin to make the comparisons which the statute requires.

The bar is entitled to know upon what basis we are conducting the proportionality review mandated by the statute. Defendant Pinch has expressly and reasonably requested that we provide this knowledge. We should grant the request. We should not continue to keep the manner in which we perform this duty shrouded in mystery.

9. In my dissenting opinion in *State v. Rook*, *supra*, 304 N.C. at 245-46, 283 S.E.2d at 758-59, I pointed out that rarely do juries in this state impose the death penalty in cases where a defendant was found to have been under the influence of a mental or emotional disturbance or whose capacity to appreciate the criminality of his conduct or to conform his conduct to law was impaired. I suggested that this Court should be slow to affirm death penalties in which either of these mitigating circumstances was found to exist because the penalty might well be excessive to the penalty imposed generally by juries in these kinds of cases.

STATE of North Carolina

v.

Larry Darnell WILLIAMS.

No. 70A81.

Supreme Court of North Carolina.

June 2, 1982.

Defendant was convicted before the Superior Court, Gaston County, Frank W. Snepp, Jr., J., of first-degree murder under the felony-murder rule and was sentenced to death. The defendant appealed. The Supreme Court, Meyer, J., held that: (1) record clearly supported jury's guilty verdict and its finding of the aggravated circumstance upon which sentencing court based its sentence of death, and (2) sentence of death was not excessive or disproportionate to penalty imposed in similar cases, considering both crime and defendant.

APPENDIX B

Judgment of the Supreme Court of North Carolina,
rendered June 22, 1982

JUDGMENT
SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

vs.

MICHAEL EDWARD PINCH

XXXXX 19 81

No. 43A81 Guilford *County.*

This cause came on to be argued upon the transcript of the record from the Superior Court Guilford *County: Upon consideration whereof, this Court is of opinion that there is* no *error in the record and proceedings of said Superior Court.*

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable J. WILLIAM COPELAND, Associate *Justice, be certified to the said Superior Court, to the intent that* XXXX PROCEEDINGS BE HAD THEREIN IN SAID CAUSE ACCORDING TO LAW AS DECLARED IN SAID OPINION

And it is considered and adjudged further, that the Defendant Do Pay *the costs of the appeal in this Court incurred, to wit, the sum of* ****ONE-HUNDRED FORTY-EIGHT AND 50/100**** *dollars ($* 148.50 *), and execution issue therefor. Certified to Superior Court this* 22nd *day of* June *19*82.

A TRUE COPY

J. GREGORY WALLACE
Clerk of the Supreme Court.

By:

APPENDIX C

North Carolina General Statutes,
Chapter 15A, Article 100
Capital Punishment

(N.C. Gen. Stats. §§15A-2000, 2001, 2002 and 2003)

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. —

(1) Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is

discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f). Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. — Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. — When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. —

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. — Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any [homicide,][1] robbery, rape [or a sex offense,][2] arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

[(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.][3]

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1 Bracketed portion added by a amendment of June 22, 1981, effective upon ratification. 1981, Sess. Laws, c. 652.

2 Bracketed portion added by 1979 amendment, effective January 1, 1980. 1979 Sess. Laws, c. 682, ss. 9, 14.

3 Bracketed portion added by amendment of May 14, 1979, effective upon ratification. 1979 Sess. Laws, c. 565.

(f) Mitigating Circumstances. — Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.
(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.
(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
(5) The defendant acted under duress or under the domination of another person.
(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
(7) The age of the defendant at the time of the crime.
(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.
(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1.)

GENERAL STATUTES OF NORTH CAROLINA

1978 Replacement Volume 1C

§ 15A-2001. Capital offenses; plea of guilty. — Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may sentence such person to life imprisonment or to death pursuant to the procedures of G.S. 15A-2000. Before sentencing the defendant, the presiding judge shall impanel a jury for the limited purpose of hearing evidence and determining a sentence recommendation as to the appropriate sentence pursuant to G.S. 15A-2000. The jury's sentence recommendation in cases where the defendant pleads guilty shall be determined under the same procedure of G.S. 15A-2000 applicable to defendants who have been tried and found guilty by a jury. (1977, c. 406, s. 2.)

§ 15A-2002. Capital offenses; jury verdict and sentence. — If the recommendation of the jury is that the defendant be sentenced to death, the judge shall impose a sentence of death in accordance with the provisions of Chapter 15, Article 19 of the General Statutes. If the recommendation of the jury is that the defendant be imprisoned for life in the State's prison, the judge shall impose a sentence of imprisonment for life in the State's prison. (1977, c. 406, s. 2.)

§ 15A-2003. Disability of trial judge. — In the event that the trial judge shall become disabled or unable to conduct the sentencing proceeding provided in this Article, the Chief Justice shall designate a judge to conduct such proceeding. (1977, c. 406, s. 2.)

APPENDIX D

Excerpts from Trial Record

Voir Dire Examination of Juror Neal	D1
Voir Dire Examination of Juror Rogers	D2
Testimony of Sherry Olivey	D4
Testimony of Louise Nixon	D6
Excluded Defendant's Exhibits 1, 2 and portions of 3 and 4	D9
Motion to Allow Witness Interview by Medical Expert	D11
Pre-Trial Motion Hearings	D12
Order (denying Motion)	D13
Testimony of Dr. Allen Sherrow	D14

VOIR DIRE EXAMINATION OF PROSPECTIVE JUROR MARY D. NEAL:

Q. [By Mr. Wannamaker, Assistant District Attorney] Now, at the conclusion of the first part of the trial, if the jury finds Michael Pinch guilty of first degree murder as to either one of these killings or as to both of them, then we go at that point into the second part of the trial. That's called the sentencing part. Now, at that time, his Honor, Judge Walker, will give the jury further instructions with regard to the applicable law and with regard to the procedure you are to follow in determining which one of two possible sentences you will impose. Now, those two sentences that you are to consider and impose one of are the death penalty and life imprisonment. Do you follow me so far?

A. Yes, I think so.

Q. Do you have any objection to the death penalty?

A. Well, that's a hard question to answer.

Q. Yes, ma'am.

A. I've never been able to answer it like a cut and dried thing. It's hard for me, very hard for me to make decisions, I've never been able to make decisions very well. I had someone to help me, but I'm hard to convince too. I almost have to see something before I could really say so. That's the only way I know to answer you.

Q. Let me ask you that question in a different way.

A. All right.

Q. First of all, you don't have any objection to the death penalty generally, is that what you're saying or do you?

A. Well, there again, I really don't know. It's just hard to say. I guess if you knew for a fact, if I saw something done, I would go along with it.

Q. Let me ask that question in a different way, Mrs. Neal, if you're a member of this jury and we get to the second part of the trial, that means you've already found him guilty of murder in the first degree in one or both cases, based on the evidence in this case, what happened in this case and based on the law that Judge Walker gives to you, as he tells you the law, if you deem it to be appropriate, could you impose the death penalty?

A. I don't think so, I really don't believe so.

Q. I understand this is a tough area, but we have to inquire about this now and everyone is entitled to their own opinion. Are you saying, ma'am, that you could not and you would not vote to impose the death penalty in this case, regardless of the evidence.

A. I don't know. I guess if it was proven to me, I guess I could.

Q. If what was proven to you?

A. I would have to be -- I would have to absolutely know for sure, I mean no doubt whatsoever.

Q. Now understand you would have already found him guilty of murder in the first degree or we would not be at the sentencing phase, so his guilt would have been established or you would not have found him guilty. At this point you would be determining what sentence to impose based on the law that the Judge gives you and based on the facts, based on what he did, what you've already found him to have done. At that point, could you impose the death penalty if you found it to be appropriate and in accordance with the law that the Court gives you or would you not -- would you simply not impose the death penalty under any circumstances? I have to kind of keep after you on this point because it is crucial.

A. I still don't know, I'd rather not.

Q. You would rather not -- can you envision a situation where you could impose the death penalty?

A. Like I said, if I saw it happen.

Q. You mean if you were an eyewitness to the crime?

A. Right.

Q. You are not going to be that.

A. That's right.

Q. As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.

A. Okay, already proven guilty -- if I went along with the guilty part, if I decided they were guilty -- no, I will not.

Q. You could not impose the death penalty regardless of what the evidence is?

A. I don't believe so.

MR. WANNAMAKER: If your Honor please, we challenge for cause.

THE COURT: I understand, Mrs. Neal. I know this is very difficult for you but it's necessary to have your candid and frank answers and I thank you for them.

Do I understand that you could not even before you hear the testimony under any circumstances, impose the death penalty?

MARY D. NEAL: No, I just don't think so.

THE COURT: All right, that is a challenge for cause.

EXCEPTION NO. 17, Hpp. 99-102.

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VOIR DIRE EXAMINATION OF PROSPECTIVE JUROR FRANK J. ROGERS:

Q. [By Mr. Wannamaker, Assistant District Attorney] Now, let me talk to you a little bit about the law in this case and tell you a few rules of law for the purpose of being able to ask you a few specific questions that are necessary to be asked in this particular case. I am going to repeat some of what Judge Walker said to you for the purpose of framing these questions. Firstly, as he indicated, the procedure for trying a first degree murder case in North Carolina is a two phase or a bifurcated trial. The first thing we do after we select this jury is we try the issue of whether or not Michael Pinch is guilty or not. The sole thing for the jury's consideration is, is Michael Pinch guilty of first degree murder or is he guilty of some lesser crime that the Court may instruct you on, or is he not guilty.

Now, if the jury renders a verdict of guilty of murder in the first degree, we then go to the second phase of the trial and only if the jury reaches that verdict. The second phase of the trial is known as the punishment or sentencing phase. At that point, the jury and it will be the same jury unless something transpires that makes that jury unable to, the jury will receive additional instructions from the Judge, Judge Walker, will hear additionally from the lawyers in the case and probably hear additional evidence. At that time, if the State establishes that there is an aggravating circumstance, the jury's duty will be to consider the imposition of one out of two possible sentences, that is, the death penalty and life imprisonment.

Now, having said all of that, if you are selected as a member of this jury and assuming that the jury returns a verdict of murder in the first degree, guilty, and we get to the second phase, can you consider the imposition of both the death penalty as well as life imprisonment?

A. That death penalty, I don't go for that too much.

Q. Okay, let me go at it a different way. Do you have any religious, moral, ethical or any beliefs opposed to the imposition of the death penalty?

A. Not really, except my own convictions.

Q. I'm asking you now for your opinion and your convictions?

A. I say I don't think much of the death penalty.

Q. Okay. Let me go back and try it again. The law is that if the jury returns a verdict of first degree murder, and during a sentencing phase the State, me, establishes that there are aggravating circumstances as the Court will explain in his instructions as a matter of law as to what those are, then it is the jury's duty, sworn duty, to consider both. Now, after considering both you render the verdict that you and the other jurors deem appropriate, but your duty is to consider imposing both. Can you do that?

A. I can consider, but as I say --

Q. You tell me you would consider it but then you wouldn't do it, is that what you are saying?

MR. HARRISON: Objection.

A. (By witness) I said I would lean toward life imprisonment, if you want me to tell the truth about it, that's what I'm doing.

Q. Yes, sir, I certainly do and I appreciate it and this is a difficult thing to ask.

THE COURT: Let me ask him.

MR. WANNAMAKER: Yes, sir.

THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a verdict which would result in the imposition of the death penalty?

MR. ROGERS: That is true.

THE COURT: Challenge for cause allowed.
EXCEPTION NO. 7

MR. WANNAMAKER: That's my line, yes, I would challenge him for cause. Rpp. 66-68.

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TESTIMONY OF SHERRY OLIVEY:

While Michael was living with us I observed him using drugs and alcohol. I observed him using MDA, drinking beer, liquor, quaaludes, valium, crank. I can honestly say that he drank or took something every day that I've known him. That includes alcohol. I did not see him offer any violence to anyone, or threaten anyone. Michael was not a social drinker. He always went to the max on everything to where he couldn't walk anymore or was passed out. I have seen him when he has

gone too far in the use of alcohol or the use of drugs. I have seen him take alcohol or drugs to the point where he is unconscious or in some state like that.

Q. Can you relate any occasion?

A. Yes. We were over at a friend's house one Sunday afternoon --

MR. WANNAMAKER: Excuse me a minute. I'm going to object to that.

THE COURT: Objection sustained.
EXCEPTION NO 128

Q. Do you have any knowledge of, on any occasion, where he took an overdose of drugs?

A. Yes I have.

MR. WANNAMAKER: Objection.

Q. During the period of time that he -- what period of time did he live with you?

A. Latter part of summer of 1978 till about the middle of summer of 1979.

Q. During this time, did you -- do you have any knowledge of any overdose of drugs --

MR. WANNAMAKER: Objection.

THE COURT: Well, just a minute. Objection sustained.
EXCEPTION NO. 129

Q. In the month of January 1979 -- excuse me, strike that. In the month of January, 1980, did you have occasion to visit Michael Pinch in the hospital?

MR. WANNAMAKER: Objection.

THE COURT: Well, overruled.

MR. WANNAMAKER: Three months after the crime.

THE COURT: Overruled as to that question.

A. Yes, I did.

Q. Which hospital?

A. Cone Hospital.

Q. And -- and did you have occasion to talk to Mr. Pinch?

A. He wasn't able to talk. He was in --

MR. WANNAMAKER: Objection, if your Honor please. Motion to strike all of that.

THE COURT: Motion to strike allowed. Don't consider the answer, members of the jury.
EXCEPTION NO. 130

Q. Do you know why he was in the hospital?

THE COURT: Objection sustained.

MR. WANNAMAKER: Objection. Rpp. 286-288.

She was also asked about what feelings he had expressed to her about his crime:

I have been in the courtroom throughout this trial. I have been every day. Since Michael Pinch has been confined in the jail, I have talked to him more than a couple of times.

Q. What statements, if any, has he made to you about his feelings about what happened on October 18, 1979?

MR. WANNAMAKER: Objection.

THE COURT: Sustained.
EXCEPTION NO. 132. Rp. 288.

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TESTIMONY OF LOUISE NIXON:

DIRECT EXAMINATION by Mr. Enochs:

(R.p. 289)

Since February 1980 I have corresponded with Michael constantly. In Michael's letters to me he made statements about his attitude about what he happened in October of 1979, I probably received up to sixteen letters from Michael. [Defendant's Exhibit one through five are marked for identification and exhibited to District Attorney] [Defendant's Exhibit No. 1 handed to the witness] Defense exhibit is a letter from my son addressed to me and dated February 15, 1978 in Greensboro. It is postmarked February 18, 1980. Inside the envelope there is a letter from my son. The letter is dated February 14th.

MR. WANNAMAKER: Object.

THE COURT: What are your grounds for your objection?

MR. WANNAMAKER: May I approach the bench?

THE COURT: Hold up on that, and in the interest of time -- I don't mean to hurry you -- give you an opportunity to be heard. I thought you might get on to something to else. Rp. 291.

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CONTINUATION OF DIRECT EXAMINATION OF LOUISE NIXON BY MR. HARRISON:

[Mr. Wannamaker [Assistant District Attorney], Mr. Harrison and Mr. Enochs [Defense Counsel], approach the bench and discuss the letters written by the defendant to Louise Nixon]

THE COURT: All right. Now the State has objected to, No. 1, the letter, No. 1. Let Mrs. Nixon come back to the stand. Open No. 1. Is there anything in that that I allowed?

[The witness, Louise Nixon, returned to the witness stand.]

THE COURT: Objection is sustained as to No. 1. Now, are you offering No. 2?
EXCEPTION NO. 143

MR. ENOCHS: Yes, sir.

THE COURT: Is there anything --

MR. ENOCHS: Offering Defendant's Exhibit No. 2.

MR. WANNAMAKER: Objection.

THE COURT: Objection is sustained.
EXCEPTION NO. 144

CONTINUATION OF DIRECT EXAMINATION OF LOUSIE NIXON BY MR. ENOCHS:

Defense Exhibit No. 3 is a letter from my son. The letter is postmarked May 23, 1980 I believe. The ink is smeared. It could be March. [The witness opens the envelope and removes the contents]

Inside the envelope is a letter from my son.

MR. WANNAMAKER: I lodge a general objection to No. 3, if your Honor please.

Q. Mrs. Nixon, I would ask you to read --

THE COURT: Wait just a minute! Did I rule on --

THE COURT: Objection is sustained except to portion indicated on the letter to counsel, which objection is overruled; and the court will permit Mrs. Nixon to read that portion at this time to the jury.
EXCEPTION NO. 145

'It hurts me to know I could take a person's life, and it would probably hurt much more as I grow older; but it's done, and I'm living for the future now.'

Defendant's Exhibit No. 4 is also a letter from my son dated April 8, 1980. Inside the envelope is the letter.

Q. Let me see that just a minute. I'll ask if you will read --

MR. WANNAMAKER: I object to the letter.

THE COURT: Objection is sustained except as to the portion indicated, and objection is overruled as to that. The court will permit Mrs. Nixon to read the portion indicated by the marks.
EXCEPTION NO. 146

'Everything here is all right, and I am slowly but surely, cleaning up my act; and it is really helping me out as far as getting along with people.'

Defendant's Exhibit No. 5 is also a letter from my son dated March 18, 1980. Inside the envelope is a short note and a poem.

Q. Would you read the note and the poem?

MR. WANNAMAKER: Objection.

THE COURT: Objection overruled.

'Mom, I'm not feeling very well. I feel weak and have been laying down a lot; so I don't feel very much like writing, but here is a poem I wrote you all. I had a friend rewrite it because he's got a good handwriting. I hope you like it. It took me a while to finish it. I love you. Michael.'

The poem reads as follows:

'For my family. In the past when I was just -- it was just life and me, I often wondered if my family really cared of me; in that day and age I was evil and unkind, always had violence, drugs, and women on my mind. Now I have matured and love my family very much. After all the hurt I've caused, it's their heart I hope I've touched. My mother is beautiful. My brother and sisters are wise, and I hope to be with them one day high up in the sky. So when that day of judgment comes to me and I'm up on my knees, I hope by then I fulfill my part in life and society. Now if I'm refused and sent to the depths of hell, I will lift my head and say to myself, "Michael, it's god's will." As I sit in my cell and pray and pray to seek god every night, it seems that I -- (unintelligible -- the witness is emotional)

I would like to say to my family as I close my poem, no matter what happens, my love will always be with you as it is tonight. Michael.' Rpp. 296-299.

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The material excluded by the above rulings included the following:

2/14/80

Mom,

I just received all the things you & lyn got me and I want you to know that I really appreciate it, I couldn't ask for anything more. When I left the visiting room today I was the happyest man in the world, I almost cried.

Ya know I really thought that after the way I acted when you let me come live with you in Memphis, you had figured just like Dad, That there was no way I would change or ever do anything for myself. I really realize now how I should have listened to you as a child and I'm sure it would have made me a better man than I am today. But Mom I truthfully believe its the old man's blood in me that took me down all these roads I've been down.

(over)

Now I think of how you worked so hard to bring all of us up the right way, and how I made no effort to make you proud of me, and I appologize for that with all my heart.

I promise you Mom that one day I'm going to be somebody for you, the rest of the family and for myself.

Ya know Mom I'm glad I wasn't around the house much these past years because I wouldn't of wanted Jennifer to dislike me. She really doen't know how her Big Brother was and I never want her to know because it would hurt her like it has hurt ya all.

Tell her I love her more than ever and one day I come see her. I don't know if you should Bring her to the penatenary, Maybe when she's older.

Tell Jenny that I'm praying for her every nite.

(2)

Excuse my penmenship, but ya know its kind of hard writing in the dark.

Im trying to get a light in my cell, Im sure Ill get one soon.

I hope to learn a trade in prison that will help me find work when I get out, if nothing else Ill know enough about the law to help other people.

Well, Moma Im going to go to sleep its late, bye the way I hope you and linda weren't out walking this late Because they delivered the stuff you all got me around 10:00 p.m.

I love you Mom, and I hope you had a safe trip home.

"God Bless"
Mike

Defendant's Exhibit 1.

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2/16/80

Mother

Hey Mom how are you doing? I thought Id write you and tell you the latest.

They moved me to another cell and its got a light in it.

Its also a little bit cleaner, Im pretty happy with it.

I wanted to write you again and tell you that your the best Mother anyone could ever have.

I've been doing alot of thinking and its a shame the way Ive treated you when you were trying to bring me up the right way.

I could say I'm sorry all day long but thats not going to help the hurt Im feeling now.

I think back when I was young and how hard you worked just so we could get by, and I havent done a thing but cause alot of hurt. (over)

Moma I know it hurt you bad when you found out what I was in jail for.

You dont need any more hurt, you've lived such a hard life with alot of hurt, and I realize now how much you have hurt.

I hope you forgive me for what Ive put you through.

Moma I want to prove to you so bad that I can be somebody its killing me, I swear it is, Im just praying to god I get out of prison before you get old and die on me.

I pray to god you life a long life Moma. You have to because Ive done you so wrong.

You look real heathy and beautiful now but if I get 50 years or life ill never get my chance.

Moma why couldn't I have been a good kid like linda and Bill and even Jenny, every kid you've ever had listened and did right except me.

(2)

Why is that I dont understand we came from the same Mom and I've come out from underneath the same roof and I had to be a ass hole. Why? Was that my choice or am I just mentally disturbed, you know I really wonder.

Moma I'm hurtin and I need you to answer these questions for me, please tell me what wrong with me.

I going to bed now and I will pray for you all,

I love you

Mike

P.S. I love you too Jenny.

Defendant's Exhibit 2.

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Hello there Mom, how are you doing? I am doing pretty good and was real glad to talk to you on the phone this morning. My Court date is the 11th of April as you know and it is on a friday, so I was thinking that since you are coming maybe you could come thursday and visit me and then friday come to court and then return to Arkansas friday. Cause I love for you to come talk to me here at the jail. bring Jenny too if you can cause she will be

allowed in the visiting room also, they will let her in, she is family and other people have there youngins up here.

I received the stamps and things that you sent me and I'd like to thank you again

(over)

Moma for all your support, it really helps out, some boys don't have people that give a damn. So i try to keep there spirits up and tell them about how me and my family had been apart for so long and how we are now getting real close and how happy I am to have my family back, and how my family has always been there but i would never come home or try to keep in touch with my family and also he had to do was write them and tell them that he is ready to grow up and be somebody, and that if no one else answered him, his mother would, Cause "moms" gave birth to us and Mothers seem to care more than dad, I said write and pray a little and things will work out between him and his family.

(2)

[Everything here is alright and I am slowly but surely cleaning up my act for the better and its really helping me out as far as getting along with people.] I just look over assholes and listen to wise and older men like the bible says and i am benefiting from it quit a bit. Well Mom thats all for now, tell Jennifer I love her very much, and tell Reba I said hello.

I love you,
Michael

Defendant's Exhibit 4. [Portion in brackets admitted.]

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MOTION TO ALLOW WITNESS INTERVIEW BY MEDICAL EXPERT
(Filed August 28, 1980)

NOW COMES the defendant by and through counsel and moves the court to allow defendant's medical expert, Dr. Allen Sherrow, to examine all those individuals who observed the defendant and his actions on the date of the commission of the alleged crimes in these cases. The defendant sets forth the following grounds in support of his motion.

1. Pursuant to an earlier motion, the defendant was granted an order for funds to hire medical experts to aid in the preparation of his defense.

2. That a substantial part of defendant's defense in these cases is based upon the defense of voluntary intoxication and the inability of the defendant to act with premeditation and deliberation requisite to establish first degree murder.

3. That defendant's medical expert, Dr. Sherrow, has advised counsel that private interviews with the aforesaid witnesses are indispensable to his proper assessment of the defendant's condition at the time of the alleged crimes.

4. That the defendant's counsel has been advised by the Assistant District Attorney in charge of prosecution for these cases he considers the aforesaid individuals to be 'witnesses for the State' and has consequently refused to allow interviews with them and defendant's medical expert.

5. That the ends of justice clearly require that the court order that the assistant District Attorney make available for interviews by defendant's medical expert those individuals now under subpoena as witnesses for the State who observed the defendant's demeanor and activities on the date of the alleged crimes.

WHEREFORE, the defendant requests a hearing on this motion should the court desire proof of the allegations set forth, and prays the court to immediately allow the requested interviews by defendant's medical expert.

This the 28 day of August, 1980.

s/ Michael Edwad Pinch
Defendant

s/ A. Wayne Harrison

s/Herman G. Enochs, Jr.
Attorneys for Defendant

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PRE-TRIAL MOTION HEARINGS

[Prior to trial, the Court heard arguments on some of the pre-trial motions filed. The Motion to Suppress was held during trial.]

[In addition to the arguments in support of the motions filed, the defendant argued, as to the Motion to Sequester the State's witnesses, that the State's witnesses should be sequestered for trial to prevent each from hearing the testimony of the others and conforming their testimony to the testimony of prior witnesses. The defendant asserted that each of the co-defendant witnesses had made prior statements to the police, but the defendant did not have access to those statements, was not entitled to them under discovery and was refused permission to talk to the co-defendant witnesses by their attorneys. If the witnesses remained in the courtroom it would be impossible for the defendant to show that the witnesses' testimony was conformed to the earlier witnesses testimony, since the defendant had no prior statements to impeach the witnesses. The defendant asserted that if the witnesses were permitted to listen to each other's testimony, he would be prejudiced and denied a fair trial.]

[Also prior to trial, the defendant requested that the psychiatrist hired to assist the defendant in preparing a defense be permitted to have access to the State's witnesses. The defendant asserted that the

psychiatrist could not come to an opinion on the defendant's mental state at the time of the offense, to a medical or scientific degree of certainty, without talking to the eyewitnesses (the co-defendants). The defendant asserted that unless the Court ordered the State to make the witnesses available to the defense psychiatrist, the defendant would be denied his right to present a defense, his right to effective assistance of counsel and due process of law.

The Court denied the motion and suggested that the defendant's psychiatrist could obtain the necessary information by sitting through the trial and listening to the testimony of the State's witnesses. The Court was informed by the defendant that the cost of this procedure would be prohibitive, particularly since the Court had only allowed fees for an expert in the maximum amount of Fifteen Hundred and No/100 ($1500.00) Dollars. The defendant also informed the Court that the psychiatrist was busy and could not afford to sit in Court for a week listening to the witnesses testify.]

[The Court denied the Motion.]
EXCEPTION NO. 6.

Rpp. 51-52.

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ORDER (Filed September 2, 1980)

THIS CAUSE, coming on to be heard and being heard before the undersigned Superior Court Judge presiding at the August 25th, 1980, session of Superior Court in Guilford County, upon defendant's 'Motion To Allow Witness Interview By Medical Expert' filed in this cause August 28, 1980, whereby defendant seeks an order compelling the witnesses for the State of North Carolina in this cause be subjected to interview by defendant's medical expert; and

The Court, having heard from both the defendant's attorneys and the attorney for the State of North Carolina, makes the following Conclusions of Law:

1. That there is no authority for the granting of this Motion in either Federal Case Law or North Carolina Case law.

2. That there is no authority for the granting of this Motion in Chapter 15A of the North Carolina General Statutes.

NOW, THEREFORE, IT IS ORDRED, ADJUDGED, AND DECREED the defendant's 'Motion To Allow Witness Interview by Medical Expert' be, and same is hereby, denied.

This the 2 day of Sept., 1980.

s/ H. H. Walker
Judge Presiding

EXCEPTION NO. 4

Rpp. 45-47.

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TESTIMONY OF DR. ALLEN SHERROW:

I also discussed with the defendant as best that he could remember his ingestion of alcohol on the 18th day of October 1979. I do not have an exact amount of alcohol that he consumed. That would require eyewitnesses to tell me what actually was consumed. It would also require behavior corroboration of what the effects of that alcohol was. I haven't had the opportunity to talk to the eyewitnesses at the time of these events.

Q. All right. And assuming that there was a consumption of twelve to eighteen beers in an eight hour priod on the day in question, do you have an opinion as to the blood alcohol level at the end of this period?

MR. WANNAMAKER: Objection.

THE COURT: Sustained.
EXCEPTION NO. 133

Q. Doctor, if the jury were to find from the evidence that the defendant had consumed between twelve and eighteen beers on the day in question over an eighteen hour period, do you have an opinion as to his blood alcohol level at the end of this time?

MR. WANNAMAKER: Objection.

THE COURT: Sustained.
EXCEPTION NO. 134

Q. Doctor would the consumption of twelve to eighteen beers have an effect on the human, mental and physical process?

MR. WANNAMAKER: Objection.

THE COURT: Sustained.
EXCEPTION NO. 135

Q. Doctor on the basis of your examination of the defendant, on the basis of his statements to you and his statements alone, do you have an opinion as to whether he was affected by consumption of alcohol in the day in question?

MR. WANNAMAKER: Objection.

THE COURT: Overruled.

A. I cannot hold my opinion with a reasonable degree of medical certainty. My definition of a reasonable degree of medical certainty being that nine our of ten doctors in a similar situation as myself would, having viewed the facts as I have reviewed them, come up with the same finding. If I were to believe that there was a consumption of twelve to eighteen bottles of beer, I would then calculate what his blood alcohol

level would be likely to be. If it would please the court, I would like to use the blackboard.

MR. HARRISON: Could he do that, your Honor?

MR. WANNAMAKER: I object, your Honor.

THE COURT: Objection sustained. Not to the use of the blackboard, but --

MR. WANNAMAKER: I move to strike.

THE COURT: Move to strike the answer is allowed. Do not consider it, members of the jury.
EXCEPTION NO. 136

Q. All right. Doctor, if you believe with regard to his consumption of twelve to eighteen beers, what is your opinion regarding the blood alcohol content?

MR. WANNAMAKER: Objection.

THE COURT: Come up here a minute.

[Mr. Harrison and Mr. Wannamaker approach the bench]

Q. Dr. Sherrow, what did Michael Pinch tell you with regard to his consumption of beer on the day in question?

A. O.K. The defendant told me that he got up that afternoon. His friend, Jimmy, came over and they --

Q. With regard to his alcohol consumption, Doctor.

A. That leads into the alcohol consumption.

Q. I see.

A. That he came over and they proceeded to consume approximately one half of a twenty-four bottle case of beer. He reported that in addition, he had shot up a half ounce or -- excuse me -- a half gram of MDA, which is Methyldiethylamphetamine.

MR. WANNAMAKER: I object and move to strike. This is corroborative, and it does not corroborate the defendant or anyone else.

THE COURT: Objection sustained.
EXCEPTION NO. 137

MR. WANNAMAKER: Move to strike.

THE COURT: Motion to strike is allowed. Do not consider it, members of the jury.
EXCEPTION NO. 138

Q. If you would, Doctor, confine your statements to the alcohol use at this point?

A. Yes. The defendant reported that an additional case and a half of Budweiser tall boys were brought to the trailer where he was living and a total of six people then drank the eighteen beers. It is unclear what happened to the remaining half case of beer that was available when the friends came over with the Budweiser tall boys. The defendant then reported that he got up and got a gun and shot at his clothes, and he reported them --

MR. WANNAMAKER: Well, I'm going to object. This is not responsive.

THE COURT: Objection sustained as to anything relating to the defendant then reported.
EXCEPTION NO. 139

Q. If you would, Doctor, just confine your statements to the alcohol consumption.

A. O.K. Two additional friends brought more beer. I believe that my statement was relevant to the consumption of alcohol because it is an indicator of his behavior in his state.

MR. WANNAMAKER: Well, I object.

THE COURT: Objection sustained.

MR. WANNAMAKER: Move to strike.

THE COURT: Motion to strike allowed. Don't consider that answer memebers of the jury. It is not responsive to the question. Dr., please make your answers reponsive to the question.
EXCEPTION NO. 140

Q. All right. Let's continue with your recall of what the defendant told you concerning his alcohol ingestion on the day in question.

A. Confining it stricktly to his ingestion, he reported that the group then had eight cases of beer available for consumption and that he and the company -- well, he and his friends, Jimmy, along with the rest of the group, became progressively more intoxicated.

MR. WANNAMAKER: Move to strike all of that. He still hasn't answered the question.

THE COURT: Objection sustained. Motion to strike allowed. Do not consider the answer, members of the jury.
EXCEPTION NO. 141

Q. All right, Doctor, based upon what the defendant related to you regarding his alcohol ingestion, do you have an opinion with regard to his blood alcohol level? Again, let me remind you that I'm asking you to make that -- to offer that opinion based on what the defendant told you about his ingestion.

MR. WANNAMAKER: Objection.

THE COURT: Blood alcohol level at what time?

MR. HARRISON: At the time of the shooting.

THE COURT: Objection overruled if he has an opinion. I don't know.

A. Based on what the defendant told me --

THE COURT: Do you have an opinion?

A. Yes, I have an opinion. I cannot hold it to a reasonable degree of medical certainty --

MR. WANNAMAKER: Well, objection.

THE COURT: Objection sustained.
EXCEPTION NO. 142

MR. HARRISON: One moment, your Honor.

MR. HARRISON: That is all. Thank you doctor.
Kpp. 293-296.

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NO. 82-5353

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MICHAEL EDWARD PINCH,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-5353

MICHAEL EDWARD PINCH,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rule 46.5 of the Supreme Court Rules, the State of North Carolina responds to the petition of Michael Edward Pinch and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

Michael Edward Pinch was tried, convicted, and sentenced to death in the Superior Court of Guilford County. In an opinion reported in State v. Pinch, ____ N.C. ____, 292 S.E.2d 203 (1982), the Supreme Court of North Carolina found no error in the conviction and affirmed the sentence of death.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

I. WAS THE EXCUSAL FOR CAUSE OF POTENTIAL JURORS MARY NEAL AND FRANK ROGERS A VIOLATION OF THE RULE ENUNCIATED IN WITHERSPOON v. ILLINOIS, 391 U.S. 510 (1968), THEREBY INVALIDATING THE PETITIONER'S DEATH SENTENCE?

II. WAS THE DEATH SENTENCE IN THIS CASE IMPOSED WITHOUT CONSIDERATION OF RELEVANT MITIGATING FACTORS IN VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978), WHEN THE TRIAL COURT EXCLUDED IRRELEVANT, REPETITIOUS, AND UNRELIABLE EVIDENCE?

III. SHOULD THIS COURT REVIEW THE SUPREME COURT OF NORTH CAROLINA'S INTERPRETATION OF STATE LAW WHICH IS CORRECT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW?

STATEMENT OF THE CASE

On January 29, 1980, Michael Pinch, a fugitive from North Carolina, was arrested in Anaheim, California for the murders of Tommy Dale Ausley and Freddie Eli Pachaco on October 18, 1979. His confederates, Jimmy Eanes, Billy Wayne Stanley, Leslie Hearl Stanley, Terry Brogden, Shawn Feeney, and Keith Way had previously been arrested for first degree murder or accessory after the fact to murder.

On February 4, 1980, Pinch was indicted for two counts of first degree murder by the Guilford County Grand Jury. (R. 3-4) On August 25, 1980, Michael Edward Pinch was brought to trial on both cases, which had been joined for trial at Pinch's request. (R. 14) Hearings were held prior to jury selection on, among other things, petitioner's motion filed August 28, 1980 that the District Attorney be required to allow defense counsel's medical expert access to the State's witnesses. This motion was denied by the trial court on September 2, 1980 (R. 47).

The State presented evidence showing the following:

On October 16, 1979, the defendant, Michael Pinch, who was also known as "Tennessee", was walking around in Greensboro, North Carolina with Jimmy Eanes, a friend, when they ran into Freddie Eli Pachaco, also known as "Rabbit". (R. 215). Pinch disliked "Rabbit" due to his having seen a girlfriend of Pinch's and due to his having worn "colors", (motorcycle gang insignia) to which he was not entitled. (R. 145) Pinch told Eanes he hated that punk (Pachaco) and wanted to fight him. Pinch thought they would fight, but Pachaco was conciliatory and offered him some marijuana. The group then went to a trailer where they smoked marijuana and drank beer. Pachaco asked Pinch if Pinch were after him. Pinch stated, "I think you're a punk and if I was going to kick your ass, I would have already done it." (R. 215).

The next day, at Gloria Ricker's trailer, where Pinch apparently lived (R. 106, 131), Pinch, Jimmy Eanes, Shawn Feeney, Keith Way, Billy Wayne Stanley and Leslie Pearl (Stanley) got together to drink beer and listen to music. The atmosphere was calm and pleasant, with everyone apparently having a good time and getting along (R. 106, 116, 145). Freddie Pachaco and a friend of his, Tommy Ausley, unexpectedly came over, bought a case and a half of beer, and joined the party. As the evening wore on, Pinch told several of his friends of his continuing dislike for Pachaco (R. 107, 132, 141, 145) and that he would kill him. During the evening, Pinch took Shawn Feeney's shotgun and shot it at a clothesline (R. 107, 119, 144, 147). A sheriff's deputy came to the trailer after the shooting and spoke to Pinch, who denied doing any shooting. The deputy then left.

Pinch left Gloria's trailer around 10:00 p.m. and returned with Bobby Smith's loaded sixteen gauge shotgun which he borrowed from Bobby Smith's girlfriend, Lynn Marie Taylor

(R. 120). He told her he wanted to scare someone with it.

Pinch then suggested that everyone go to the Stoker Motocycle Club's clubhouse which was located in the woods off Wendover Avenue in Greensboro (R. 107, 116-117, 132, 141, 145). He got Jimmy Eanes to ride with Pachaco and Ausley to make certain that Pachaco and Ausley got to the clubhouse (R. 132, 170). Keith Way drove Pinch and Shawn Feeney to the clubhouse. On the way to the clubhouse, Pinch stated to Way and Feeney that he intended to kill Pachaco and Ausley (R. 107, 117, 215-217) after Keith Way had asked him why he had the shotgun. Way and Feeney told Pinch that he shouldn't do that. (R. 217).

When they got to the clubhouse, Michael Pinch opened the door and Way, Pachaco, Ausley, Feeney, and Eanes went in and began playing foozeball (R. 108, 117, 132). Michael Pinch sat behind the bar with the shotgun on his lap, saying nothing. (R. 108, 117, 132). Leslie Hearl and Billy Wayne Stanley looked at a photograph album and then went into an adjacent room. (R. 141, 145).

Sometime that evening Pinch instructed Jimmy Eanes, his best friend, to cut Pachaco's jugular vein; that he, Pinch, would back him up (R. 217, 172-173). He gave Eanes his knife. Eanes, in fact, did cut Pachaco on the throat. Pachaco looked confused and got emotional, but did not fight back (R. 108, 117, 133, 141, 145). Ausley started to come over to help Pachaco and was confronted by Eanes who threw a chair at him. Things calmed down briefly according to Eanes (R. 133). Feeney and Way went outside the clubhouse (R. 108, 117).

At sometime between five to twenty minutes after Eanes slashed Pachaco on the neck (R. 217, but see R. 133), Michael Pinch raised the shotgun at Pachaco and pointed it at him.

Pachaco told the defendant "I will go down laughing." Without replying, Pinch shot Pachaco in the chest (R. 133, 142, 173, 217). He then turned the shotgun on Ausley, a person he had never seen before that day (R. 172). Ausley begged "No, no not me" or "No, it's cool. Not me," (R. 133, 173) and put his hands up. Pinch calmly cleared the chamber of the shotgun on an empty shell stuck there and then shot Ausley through the neck (R. 217, 165, 173, 133, 142). Pinch was told that "Rabbit" was still moaning, so he walked over to Pachaco as he lay helpless on the floor and shot him again at point blank range just below the heart (R. 133-134, 142, 173, 217). During these shootings, Michael Pinch had a "sort of grin" on his face (R. 142).

After he killed Pachaco and Ausley, Pinch walked out to the porch of the clubhouse and informed Feeney and Way that he'd just blown away two dudes (R. 108, 134, 142, 174).

Pinch then directed everyone to help him dispose of the bodies. Pinch and his cohorts got the bodies into the green automobile (R. 109, 117, 134, 174, 217) and then Eanes and Stanley were directed to dump the bodies (R. 109, 117, 134, 142, 174, 217). Jimmy Eanes drove the automobile with the bodies over to Causey Street where he abandoned the car in a ditch (R. 110-111, 117, 119, 134). After supervising the dumping of the bodies, Pinch went with Leslie Hearl and Billy Wayne Stanley to Leslie's father's home (R. 143, 146, 175). On the way to the Hearl residence he told Billy Wayne Stanley that he had killed Pachaco and Ausley because he had no use for people like that. Jimmy Eanes took the shotgun back to Bobby Smith (R. 134, 140). In response to questions by other friends about why he had killed the two men, Pinch stated he was a one percenter and Pachaco wasn't; that he had no regrets. He described to Terry Brogden how the blood had gurgled out of the bodies (R. 149), and told him that they (Pachaco and Ausley) had it coming to them (R. 149).

Pinch directed Billy Wayne Stanley and Leslie Hearl to clean the blood up from the clubhouse floor, which they did (R. 143, 146). Terry Brogden, another Stroker Club member, painted the floor to hide the bloodstains. (R. 148).

The next night, Pinch attended a party at the clubhouse (R. 176-177).

Meanwhile, the bloody car and its grisly contents had been found by Robert Carter, who lived near where the car had been abandoned (R. 103-104). Michael Pinch saw a news-clip of the automobile and discovered the police had found fingerprints. He prudently left for California about three weeks after the killing after hiding in the woods near Shawn Feeney's home (R. 178) where he was later arrested, waived extradition, and confessed.

The pathologist who examined the bodies of Ausley and Pachaco stated they died of gunshot wounds and had blood alcohol levels of .12 (Ausley) and .15 (Pachaco at the time of their deaths.

The defense presented evidence by way of cross examination that Pinch was drunk when the killings occurred. The jury returned a verdict of guilty of first degree murder in both cases.

During the sentencing phase of the trial the State generally relief on the evidence produced at the guilt phase of the trial, although Officer L. G. Fuller of the Greensboro Police Department did testify as a rebuttal witness concerning Pinch's admissions that he had an affair with Sherry Olivey (R. 300).

The defense during sentencing presented evidence from Michael Pinch, Dr. Billy Royal, Sherry Olivey, Linda Pinch, Louise Nixon, and Dr. Allen Sherrow.

Michael Pinch put on evidence that he was nineteen when he gunned down Pachaco and Ausley (who were eighteen and nineteen years old) (R. 246) and that he had been more or less living on his own for periods of time after he was thirteen. His family life had been chaotic due to his father's leaving his mother, his mother's having to work, and then his mother's marriage to a bisexual. He had been drinking heavily (a couple of six packs of beer a day) and taking drugs since he was fourteen years old (R. 278). He stated he did not regret killing Freddie Pachaco at the time, and did not regret killing him at the time he was arrested two months later (R. 279), but that he regretted killing Pachaco now. He stated when he killed the two men, he had drunk a case of beer and was drunk. He would only have fought them if he had been sober (R. 278). He told that he changed his thinking after going to jail and getting away from drugs and alcohol (R. 279). Dr. Billy Royal, a forensic psychiatrist at the State Mental Hospital testified that Michael Pinch had liver damage from apparent heavy drinking (R. 283). He gave Michael psychological tests and did studies as well as an intelligence test and a reading test. He testified that while Pinch scored lower than average on the intelligence test (66), his other tests indicated that his I.Q. was probably a little higher than that and fell at least into the low-normal range of intelligence.[1] He also stated that Michael Pinch had chronic depression due to an unfavorable view of himself (R. 284). On cross examination, he clarified that the depression was mild, and caused in part by his incarceration and facing two charges of first degree murder. He did not find any evidence in Pinch

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[1]In fact, Dr. Royall's report (at R. 29-30) indicates Pinch scored a 9.6 on the reading test, which puts him in the normal range of intelligence.

of the anger usually found in people of these (motorcycle gan, apparently) subculture groups. (R. 286). When he interviewed Pinch [sometime between June 2 and June 27, 1980 (R. 282)], Pinch had no particular regret over killing Pachaco, though he did feel remorse over Ausley (R. 285).

Sherry Olivey, a close friend of Pinch, testifed that Pinch lived with her and her husband for nearly a year and that they were close. She observed him use large amounts of drugs and alcohol. He was not a social drinker, but rather "went to the max" on everything to where he couldn't walk anymore or passed out, and she had seen him take alcohol or drugs to the point to where he was unconscious or in some state like that (R. 287). She was allowed to testify that he overdosed on drugs on several occasions (R. 287), but was not allowed to testify as to the particular occasions (R. 287).

Linda Pinch, Michael's sister, testified that she had received many letters from Michael and had many conversations with him and he had told her his remorse for the killings (R. 289).

Louise Nixon, Pinch's mother, testifiedas to her marital problems, and the problems Michael had growing up. She testified that she heard nothing from Pinch from when he moved from his brother's home in Greensboro (beginning of 1979) until February 12, 1980 when she learned of his arrest. She immediately went to see Michael in jail and since then has constantly been in touch with him. She received up to sixteen letters from him in which he told her of his attitude about the killings and that he regretted the killings and would not repeat those acts if he had it to do over (R. 292). Mrs. Nixon was allowed to read portions of the letters to the jury, and also a poem describing his growing awareness of the goodness of his family, his love for them, and his

desire to change his life and his new maturity and his desire to benefit society. (R. 298). The portions of the letters dealt with his regret for the killing, his living for the future and his "cleaning up his act" and getting along with people (R. 298). Mrs. Nixon was not allowed to read several letters or the entire portions of some letters introduced in evidence.

The material excluded by the judge included a letter in which Pinch discussed learning a trade in prison so he could work when he got out (App. D. 9), that he was tainted by his father's blood, that he hoped he could get out of prison before his mother died so he could make up to her the wrong he had done her, that his new cell was cleaner than the last, that he wanted his mother to tell him why he was bad and the other children were good (App. D. 10).

Dr. Sherrow testified as a defense expert in alcohol and drug addiction concerning Pinch's condition at the time of the killing. He stated Pinch told him of drinking one half to a full case of beer per day prior to his incarceration (R. 293). He was told how much alcohol Pinch thought he had ingested on the day of the killings. However, he had been unable to determine the exact amount of alcohol that Pinch consumed since he had not spoken to the eyewitnesses about that and about Pinch's behavoir during the relevant period (R. 293).[2] Due to Dr. Sherrow's lack of knowledge concerning the other accounts of the defendant's alcohol consumption and behavoir, he could not, to a degree of medical certainty, give an opinion as to whether or not Pinch was affected by consumption of alcohol during the time he killed Ausley and

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[2]It should be noted this testimony came <u>after</u> all these witnesses had testified and had been cross examined by counsel for the defendant on precisely these issues.

Pachaco. (R. 293-294). The court would not allow the Doctor to speculate since he did not hold an opinion to a reasonable degree of medical certainty (R. 296).

After the presentation of his evidence, and arguments of counsel, the court instructed the jury. The jury found in both cases two aggravating circumstances existed beyond a reasonable doubt (R. 341, 344); the jury found beyond a reasonable doubt that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty (R. 342, 344), and that the mitigating circumstances found did not outweigh the circumstances in aggravation, thus requiring sentences of death.

Defendant gave notice of appeal from the convictions and judgments of death, which convictions and judgments were affirmed by the Supreme Court of North Carolina on June 2, 1982.

REASONS FOR NOT GRANTING THE WRIT

I. THE EXCUSAL FOR CAUSE OF PROSPECTIVE JURORS, MARY NEAL AND FRANK ROGERS, DID NOT VIOLATE THE RULE ENUNCIATED IN WITHERSPOON v ILLINOIS, 391 US 510 (1968), BECAUSE THEIR ANSWERS ON VOIR DIRE CONCERNING THEIR ATTITUDES TOWARD THE DEATH PENALTY, WHEN CONSIDERED CONTEXTUALLY, SHOW THAT EACH WAS IRREVOCABLY COMMITTED BEFORE THE TRIAL BEGAN TO VOTE AGAINST THE DEATH PENALTY REGARDLESS OF WHAT THE FACTS AND CIRCUMSTANCES MIGHT PROVE TO BE FROM THE EVIDENCE ADDUCED AT TRIAL.

The holdings in Witherspoon v Illinois, 391 US 510 (1968) and its progeny are straightforward. A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. However, a State is not prohibited from excluding for cause veniremen who made it unmistakably clear that they would automatically vote against capital punishment without regard to any evidence that might be developed at trial. 391 US at 522-523. Improper excusal for cause on Witherspoon grounds of but one venireman will invalidate the death sentence. Davis v. Georgia, 429 US 122 (1976). The essence of the Witherspoon rule is that a prospective juror may not be challenged for cause based upon his or her views about capital punishment unless those views would prevent or substantially impair the performance of his or her duties as a juror in accordance with the juror's instructions and oath. A State may constitutionally insist that a juror will consider and decide the facts of a case impartially and conscientiously apply the law as charged by the court. Adams v. Texas, 448 US 38 (1980). Potential jurors cannot be disqualified for cause because the possibility of the death penalty might affect their deliberations on any issue of fact. Id.

There is no question that the Supreme Court of North Carolina recognizes Witherspoon and its progency as the law of the land. In footnote 3 of his petition for this writ, the petitioner catelogued numerous cases wherein Witherspoon issues were raised on appeal and considered by the Supreme Court of North Carolina.

The petitioner challenges the Supreme Court of North Carolina's interpretation of Witherspoon in the context of prospective juror's responses to Witherspoon questions which appear to be equivocal when taken out of context. Petitioner asserts that the answers of prospective juror Mary Neal failed to demonstrate that she was irrevocably committed before the trial began to vote against the death penalty regardless of the facts and circumstances which might emerge at trial because she responded "I don't believe so" and "No, I just don't think so" to some of the Witherspoon questions propounded to her. Taking a somewhat different tack, petitioner asserts that prospective juror Frank Rogers was improperly excluded for cause on Witherspoon grounds because the trial judge failed to make sufficient inquiry to determine whether Rogers would be unequivocably or irrevocably opposed to consideration of the death penalty despite evidence which might be introduced at trial. Citing State v. Avery, 299 NC 126, 261 SE 2d 802 (1979), the Supreme Court of North Carolina rejected these contentions after considering Mrs. Neal's and Mr. Rogers' responses in the context of their entire voir dire examinations on these points. State v. Pinch, ____ NC ____, 292 SE 2d 203, 213 (1982).

Apparently the petitioner believes that any equivocation on the part of a prospective juror who was successfully challenged for cause on Witherspoon grounds equates to a violation of the Witherspoon rule thereby invalidating the death sentence. The Supreme Court of North Carolina takes a pragmatic common sense approach to Witherspoon issues. It reviews the entire jury selection voir dire of a prospective juror, as it relates to the Witherspoon issue, in order to ascertain whether the prospective juror had in fact clearly and unmistakably conveyed his or her irrevocable commitment to vote against the death penalty (regardless of the evidence presented) even though some of the prospective jurors' responses were phrased "I don't believe so," or "No, I just don't think so." If the totality of the voir dire responses to Witherspoon questions leads unmistakably to the conclusion that the prospective juror would automatically vote

against capital punishment without regard to any evidence which might be developed at trial, then the substance of this predisposition prevails over the form of the answer. This approach is rational, reasonable, and does not violate the Witherspoon rule. This interpretation permits the State to constitutionally cull from the jury those prospective jurors whose views on capital punishment would prevent or substantially impair the performance of their duties as jurors in accordance with their instructions and oath as they relate to capital punishment.

The issue raised by the petitioner is not a new one. It was also raised in State v. Barfield, 298 NC 306, 259 SE 2d 510 (1979), cert. denied 448 US 907 (1980), rehearing denied 448 US 918 (1980), cert. denied 102 S.Ct. 494 (1981), rehearing denied 102 S.Ct. 693 (1981), habeas corpus petition dismissed sub nom. Barfield v. Harris, 540 F.Supp. 451 (E.D.N.C. 1982). This was one of the points raised in Barfield's petition for writ of certiorari which this Court denied [448 US 907 (1980)].

Very recently, Chief District Court Judge Dupree analyzed this issue when it was raised by Barfield by way of a habeas corpus petition. Barfield v. Harris, supra. The following excerpt from Judge Dupree's Memorandum of Decision and Order captures the essence of the issue:

> Petitioner contends that Mr. Dent's exclusion violated Witherspoon because he never stated unequivocally that he could not vote for the death penalty under any circumstance. In support of this contention petitioner correctly notes that the exclusion of even one prospective juror in violation of the Witherspoon standard invalidates a subsequent sentence of death, regardless of whether the state went to trial with peremptory challenges unexercised. Davis v. Georgia, 429 US 122, 97 S.Ct. 399, 50 L.Ed. 2d 339 (1976); Moore v. Estelle, 670 F. 2d 56 (5th Cir. 1982); Burns v. Estelle, 592 F.2d 1297 (5th Cir. 1979), adopted en banc, 626 F.2d 396 (5th Cir. 1980). That the relevant statements by the prospective juror must be completely unequivocal has been recently reaffirmed by the Fifth Circuit in Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981). There a prospective juror
>
> > "was first asked whether he had conscientious scruples against the infliction of the death penalty whereupon he stated, 'I don't know what that means.' When asked if he could ever vote to inflict the death penalty, he replied, 'No, I don't think I could.' Then, in response to the question, 'You just don't feel like you would be entitled to take another person's life in that fashion?' He nodded and then said, 'No, I could not.'" Id. at 677.

The Fifth Circuit held that "[t]hese questions and answers fall far short of an affirmation by [the prospective juror] that he would automatically vote against the death penalty regardless of the evidence," thus invalidating the death sentence. Id. See also Alderman v. Austin, 498 F.Supp. 1134 (S.D. Ga. 1980); State v. Johnson, 298 NC 355, 366, 259 SE 2d 752 (1979) (Johnson II).

Petitioner contends that any time a prospective juror states that he "believes" or "thinks" or "feels" that he could not vote to impose the death penalty, rather than stating absolutely that he could not, the juror may not be excluded under Witherspoon. The precise words used by the juror, however, are not dispositive. Burns and Granviel turn instead on the perfunctory nature of the voir dire examination and on the fact that the questions were directed at whether the responsibility to recommend life or death would "affect" their deliberations as juror. In contrast, Darden v. Wainwright, 513 F.Supp. 947 (M.D. Fla. 1981), the court held that there was no Witherspoon violation where a prospective juror, in response to a question as to whether he would be unwilling to return a recommendation of death, had answered, "I believe I would," Id. at 960. The court rejected the contention that this response was ambiguous and held that "the hard question was asked, repeatedly and without deviation from the minimal requirements of Witherspoon." Id. at 962. Similarly, in McCorquodale v. Balkcom, 525 F.Supp. 408 (N.D. Ga. 1981), appeal pending, the court found that initial equivocation during voir dire examination was not fatal when the prospective jurors ultimately did make it unmistakably clear that they could not vote for the death penalty. The court assessed the "bottom line" rather than search the entire voir dire for signs of equivocation. Id. at 425. "The trial judge often must make judgments as to whether or not a prospective juror really means it when he says something. This Court believes some deference is due the judgment of the trial judge, who heard these two jurors as they stated that their reconsidered positions were that they could not impose the death penalty under any circumstances." Id. See also Mason v. Balkcom, 487 F.Supp. 554, 560 (M.D. Ga. 1980), reversed on other grounds, 669 F.2d 222 (5th Cir. 1982); Douglas v. Wainwright, 521 F. Supp. 790, 796-800 (M.D. Fla. 1981).

The court views the examination of Mr. Dent in the same light. Although he certainly equivocated during the voir dire, he stated several times that under no circumstances could he vote to recommend the death sentence. The trial judge was actively involved in the examination and carefully phrased the "hard" question. He apparently believes that Mr. Dent's opinion, ultimately was unequivocal. This court agrees and therefore holds that there was no Witherspoon violation in the exclusion of Mr. Dent. Indeed, in view of Mr. Dent's many statements that he could not under any circumstances vote to impose the death penalty, denying the motion to excuse him for cause might well have been error. 540 F. Supp. 451, at 464-466.

As Judge Dupree made clear, there is no Witherspoon infirmity for a court to focus on the "bottom line" after examining

the voir dire in question, rather than to merely search for signs of any equivocation. A trial judge sees and hears the answers given by a prospective juror. He or she is uniquely situated to see the demeanor of prospective jurors, to evaluate their behavior, and to assess the nuances and intangibles that elude capture on the written page of a transcript or record on appeal. A trial judge's interpretation of some seemingly equivocal responses should not be lightly disregarded as long as the "bottom line" unmistakably leads to the conclusion that the prospective juror would vote against capital punishment regardless of evidence which might be developed at trial.

Turning specifically to the jury selection voir dire of Mary Neal and Frank Rogers, it is the State's contention that the Supreme Court of North Carolina's interpretation of Witherspoon in this petitioner's case was correct. During her voir dire examination, the following occurred:

> Q. [By prosecutor] As a juror, can you envision a situation where you would impose the death penalty, you're not going to be an eyewitness, you're going to have to act on what other people tell you they saw or heard.
>
> A. [By Mrs. Neal] Okay, already proven guilty -- if I went along with the guilty part, if I decided they were guilty -- no, I will not.
>
> Q. You could not impose the death penalty regardless of what the evidence is?
>
> A. I don't believe so. (Emphasis added, Rpp 100-101).

Upon further Witherspoon questioning by the trial judge, Mrs. Neal stated that, "No, I just don't think so." Reading Mrs. Neal's responses in context, the "bottom line" is that she clearly expressed sufficient refusal to follow the law just as the Supreme Court of North Carolina concluded. State v. Pinch, 292 SE 2d at 213. There is no Witherspoon error here.

After questioning of Mr. Rogers by the prosecutor and trial judge, the following took place:

> THE COURT: Mr. Juror, are you saying that before you have heard any evidence in this case, Mr. Rogers, if the defendant should be found guilty of either charge of murder in the first degree, without hearing any evidence, that under no circumstances would you return a verdict which would result in the imposition of the death penalty?

Mr. Rogers: That is true. (Rpp 67-68).

Mr. Rogers' responses clearly, unmistakably, and unequivocally convey the message that he would not vote for capital punishment under any circumstances. His responses goes far beyond being a "life-prone" juror, as the petitioner contends. Read contextually with a grain of common sense, it is clear that he expressed sufficient refusal to follow the law relating to capital punishment and was properly excluded for cause. There is no Witherspoon error here either.

In summary, both Mrs. Neal and Mr. Rogers excusals for cause did not violate the rule enunciated in Witherspoon. Their responses to questions propounded to them on voir dire concerning their attitudes toward the death penalty, when considered contextually, show that each was irrevocably committed before the trial began to vote against the death penalty regardless of what the facts and circumstances might prove to be from the evidence adduced at trial. For these reasons, this Court should not grant the petitioner the writ he seeks.

In addition, the State also believes that review of this case at this time on this issue would be premature. Barfield v. Harris, supra, is currently pending in the Fourth Circuit Court of Appeals. The decision of the Fourth Circuit will more fully develop and clarify this issue and could obviate the need for this Court to review this issue.

II. THE DEATH SENTENCE IN THIS CASE WAS NOT IMPOSED WITHOUT CONSIDERATION OF RELEVANT MITIGATING FACTORS IN VIOLATION OF LOCKETT v. OHIO, 438 U.S. 586 (1978) WHEN THE TRIAL COURT EXCLUDED IRRELEVANT, REPETITIOUS, AND UNRELIABLE EVIDENCE.

As the second part of his request that this Court grant certiorari, Michael Pinch argues that certain rulings in the sentencing phase of his case impermissibly limited jury consideration of mitigating circumstances in ways inconsistent with this Court's decisions in Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, supra; Green v. Georgia, 442 U.S. 95 (1979); and Eddings v. Oklahoma, ___ U.S. ___, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982). However, this argument is simply not borne out by the record in this matter now before the Court. Woodson, Lockett, Eddings, and Green hold basically that, as stated in Lockett v. Ohio, supra, at page 604:

> "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (emphasis added)

These cases do not hold that the state must nullify all of its traditional rules of evidence dealing with relevancy, repetition, and reliability for a sentencing hearing. Nor do these cases set out how the mitigating factors must be identified for the jury.

The petitioner has divided his argument into the subcategories of mental development, positive qualities of his family relationships, mens rea, and remorse for his crimes. He also suggests the harmless error rules adopted by the Supreme Court of North Carolina in dealing with perceived errors in the sentencing hearing do not comport with Federal constitutional law. Despite the exotic subcategories constructed by Pinch, he is really arguing two things:

(1) that the North Carolina Supreme Court erred as a matter of constitutional law in holding that the evidence before the trial jury during sentencing was not sufficient to require that the trial court, pursuant to G.S. 15A-2000(b), give specific instructions on the probable existence of certain statutory and nonstatutory mitigating circumstances and (2) that the defendant's right to be free from cruel and unusual punishment was denied by the trial court's refusing to allow into evidence things deemed repetitious, irrelevant, and unreliable according to state evidentiary rules.

(1) SUBMISSION TO THE JURY OF SPECIFIC MITIGATING CIRCUMSTANCES.

Lockett and its progeny hold that the sentencer cannot limit what factors the jury may consider in mitigation; it does not set requirements as to how these factors are presented to the jury. In North Carolina, by statute, the judge must include "in his instruction to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from lists provided in subsections (e) and (f) which may be supported by the evidence and shall furnish the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances": G.S. 15A-2000(b). The Supreme Court of North Carolina has held that nonstatutory factors which may be considered by the jury pursuant to the "catchall" mitigating circumstance contained in G.S. 15A-2000(f)(9)[3] must be specifically instructed upon if a timely request is made for the specific instruction and the evidence supports such

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[3]G.S. §15A-2000(f)(9) reads as follows: "(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value."

an instruction: State v. Johnson, 298 N.C. 47, 259 S.E. 2d 752 (1979). The Court has also held, as a matter of state law, that the court should instruct sua sponte on the statutory mitigating circumstances [G.S. 15A-2000(f)(1) - G.S. 15A-2000(f)(8)] when the defendant, who has the burden of persuasion, brings forward sufficient evidence of the existence of the circumstance. State v. Pinch, supra; State v. Hutchins, 303 N.C. 321, 279 S.E. 2d 249 (1981).

Pinch characterizes the trial court's failure to charge specifically on the possible mitigating circumstances of Pinch's allegedly low mentality and alleged emotional problems during the time of the offenses as limiting the jury's full consideration of relevant mitigating factors in violation of Lockett v. Ohio, supra. In fact, the trial court in no way limited the factors the jury could consider in mitigation. All the evidence which Pinch claims supports specific instructions not given by the trial court was before the jury and the trial court allowed the defense counsel to argue to the jury the mitigating aspects of low mentality (R. 310-321) and emotional or mental disturbance at the time of the crime. While as a matter of state law, it is good procedure to charge the jury specifically on how various statutory and nonstatutory mitigating circumstances may be supported by the evidence in the case, it is not a constitutional requirement. Neither Texas nor Florida, both of whose statutes have been declared constitutional by this Court, require such specificity in the sentencing charge. In Florida the list of mitigating circumstances set out in the Florida statute is read to the jury and the jury is further told it may consider any other factor it deems mitigating. There is no specification by the Court about what factors in mitigation either of a statutory or a nonstatutory nature are shown by the evidence presented: 2nd Ed., Florida

Standard Jury Instructions in Criminal Cases, §2.09 (October, 1981). In Texas, there is no list of mitigating circumstances charged to the jury. The jury is simply told in evaluating each of the special issues, the jury may consider all the evidence admitted during the trial and sentencing hearing. See, for instance, Jurek v. Texas, 428 U.S. 262 (1976), or the record in Barefoot v. State, 596 S.W.2d 875 (Tex. Cr. App. 1975), cert. denied, 453 U.S. 913 (1981). This very issue was presented for review before the United States District Court for the Eastern District of North Carolina in Barfield v. Harris, supra (appeal pending). Judge Dupree, in denying a contention that Barfield's death penalty was invalid because the trial judge failed specifically to elaborate on various plausible nonstatutory mitigating circumstances stated, citing Lockett v. Ohio, supra, and Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981): "There was no constitutional violation because the jury was not precluded from considering nonstatutory mitigating factors." Here, too, the jury was not precluded from considering any factors which it might deem mitigating.

Even assuming that there were some Federal constitutional right possessed by Pinch to have the judge specify to the sentencing jury that certain evidence may support a certain specific circumstance the jury may find mitigating, the facts fail to show that the judge erred in not charging specifically upon the two possible mitigating circumstances that the defendant had a relatively low mentality and that the defendant committed the crimes while suffering from an emotional or mental disturbance. The evidence concerning Pinch's mental abilities was that while he scored low on the intelligence quota test (66), other tests showed Pinch's

I.Q. to be probably a little higher and fell at least in the low-normal range of intelligence.[4] This evidence fails to support a charge that the defendant had a relatively low mentality. Likewise, evidence that the defendant suffered from mild, chronic depression, some of which was induced by incarceration, does not support a specific instruction that there was evidence that the capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

The trial court correctly refused to give the two specific charges under state law because there was insufficient evidence to support such charges. Even if there were enough evidence to support the desired charges, the resultant error was not constitutional in nature since the jury was not precluded from examining that evidence: Lockett v. Ohio, supra; Barfield v. Harris, supra.

(2) EXCLUSION OF CERTAIN EVIDENCE.

As the second prong of this argument that certiorari should issue, Pinch alleged that the trial court excluded evidence which would have cast light on his mens rea at the time of the offense, his character, and his remorse for his crimes, thus denying him a right to a hearing in which his uniqueness and character could be explored. See Woodson v. North Carolina, supra; Eddings v. Oklahoma, supra. Again, these contentions are not borne out by the facts.

The Supreme Court of North Carolina has emphasized since the first cases involving the post-Woodson death penalty statute that the evidence standards in sentencing hearings should be relaxed and all relevant evidence - evidence bearing on any aspect of the defendant's character, record, or a circumstance of the offense - should not be excluded.

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[4]The record reflects, in fact, that Pinch's reading test score showed him to be of normal intelligence (R. 30). Likewise, his letters reproduced at Appendix D6-D11 hardly show a feeble mind.

State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979). However, such hearings do not nullify the usual rules of evidence, though they should be applied with more flexibility. State v. Pinch, supra. As the Court noted in Pinch:

> "This does not mean that evidentiary rules which normally apply at the guilt phase of the trial should also apply with equal force in the sentencing phase. Evidentiary flexibility is encouraged in the serious and individualized process of life or death sentencing. See Williams v. New York, 337 U.S. 241...(1949). However, as in any proceeding, evidence offered at sentencing must be pertinent and dependable, and, if it passes this test it should not ordinarily be excluded. G.S. 15A-2000(a)(3), supra; see Green v. Georgia, 442 U.S. 95...(1979)."

This standard for evidence in no way violates a defendant's rights under the Eighth and Fourteenth Amendments as a principle, or under the facts of the case before this Court.

In the present matter, a medical expert on alcohol and drug abuse was not permitted to speculate about the degree of Pinch's intoxication at the time of the murders. While such evidence would be pertinent, it simply was not reliable, as the North Carolina Supreme Court correctly recognized. Pinch suggests that the doctor's speculation should be allowed in evidence notwithstanding its lack of reliability because the doctor could not interview witnesses who might have cast some further light on the subject. However, the doctor, had he desired, could have been amply educated on the testimony of the other eyewitnesses concerning Pinch's condition and consumption of alcohol either by sitting through the court proceedings or by being briefed by trial counsel. See State v. Pinch, supra, at pp. 214-215. Reliability, as well as pertinency, must be a paramount concern in the admission of evidence at a sentencing hearing. See Green v. Georgia, supra. Reliability was not met as to this evidence, based as it was solely on self serving statements by Pinch. Therefore, there was no constitutional

violation in its exclusion pursuant to state evidentiary rules. Green v. Georgia, supra; Chambers v. Mississippi, 410 U.S. 284 (1972).

The petitioner also complains that some of his letters were excluded from evidence. In these letters he pondered why he turned out wrong and wondered if he was bad because he was tainted with his father's blood (Appendix D9); he told his mother of his love for her and his realization that he had been ungrateful for her efforts in bringing him up properly; he talked of learning a skill for when he got out of prison; and that he was sorry he had hurt her (his mother). This evidence is relevant, according to petitioner, because it brings out his human qualities.

While the cases both from this Court and the Supreme Court of North Carolina hold the concept of relevancy should be broadened in sentencing hearings, there is a point beyond which even in sentencing hearings the theory of what is relevant cannot be stretched. Rambling dialogue about tainted blood is irrelevant. Telling one's mother one is sorry to have hurt her is, at best, only tangentially connected to considerations of character. Talking about being out of prison soon has no relevant to character or any other aspect of mitigation and, if anything, would be prejudicial to the defendant since jurors apparently worry about parole eligibility when making life or death sentencing decisions. See State v. Cherry, supra, at p. 100. Even assuming the portions of the excluded letters were in any way relevant, the matter excluded was unduly repetitive and so properly excluded by the trial court. For, despite his assertions to the contrary, evidence of his new and blossoming relationship with his family was introduced through his sister's and mother's testimony as well as his poem. Evidence that Pinch had matured, regretted his actions,

and had reevaluated his life was also admitted. In fact, everything excluded in the letters except the comments about tainted blood and getting out of prison came into evidence through other sources.

Finally, the petitioner contends that the trial court erred in sustaining the prosecutor's objection concerning Pinch's feelings about killing Pachaco after Pinch answered he regretted it, and in not allowing Sherry Olivey to testify (apparently, since the answer is not in the record) about Pinch's feelings of regret over killing both Pachaco and Ausley. However, the evidence that Pinch regretted his actions was before the jury through the testimony of his mother, through his letters, and through the testimony of his sister as well as his testimony prior to the judge's sustaining the objection of the prosecutor. In the charge to the jury, the court specifically instructed the jury that Pinch stated he regretted killing the men (R. 323), that his mother and sister also testified he regretted his acts (R. 324-325), and further charged the jury that if Pinch satisfied the jury he had changed since incarceration and now appreciated the severity and error of his conduct, this could be a circumstances in mitigation (R. 333-334). The defense counsel argued this issue. Thus, this mitigating factor, like the other allegedly improperly excluded evidence, was before the jury.

Since the trial court's rulings in sentencing were proper both as to admission of evidence and as to charging on mitigating circumstances, there is no reason to examine North Carolina's harmless error rules concerning exclusion of evidence and incomplete instructions on mitigating circumstances. As is apparent from the face of this record, even if there is error, it is harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

This Court ought not grant its writ to review this issue on mitigating factors. There was no error of Federal constitutional law in the charge; likewise, there was no clear showing of improper restriction of evidence in mitigation in violation of this Court's ruling in Lockett v. Ohio, supra. There is, therefore, no vital question of Federal law presented for this Court's consideration.

III. THE SUPREME COURT OF NORTH CAROLINA INTERPRETED THE PROVISIONS OF G.S. 15A-2000 AS A MATTER OF STATE LAW AND THIS INTERPRETATION IS NOT REPUGNANT TO CONSTITUTIONAL PRINCIPLES.

The Supreme Court of North Carolina, in State v. Pinch, supra; State v. Smith, 305 N.C. 691, 292 S.E. 2d 264 (1982); and State v. Williams, 305 N.C. 656, 292 S.E. 2d 243 (1982) (all handed down on June 2, 1982) explicitly held what had been previously assumed concerning the proper reading of G.S. 15A-2000.[5] The Court construed the language of G.S. 15A-2000 (b) and (c) to require the trial court to charge the sentencing jury in a first degree murder case that if a jury found beyond a reasonable doubt that (1) one or more statutory aggravating circumstances existed, (2) that these aggravating circumstances were substantial enough to warrant the death penalty and (3) that the aggravating circumstances outweighed the mitigating circumstances, then the jury must recommend a sentence of death.

Pinch had attacked the instructions given by the trial court in his case in the Supreme Court of North Carolina on the basis that the instructions violated his statutory rights under G.S. 15A-2000 and the United States Constitution since

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[5]North Carolina Pattern Instructions, Crim. §150.10 (Replacement, 1980). State v. Barfield, supra; State v. Martin, 303 N.C. 246, 278 S.E. 2d 214, cert. denied ____ U.S. ____, 102 S.Ct. 431, 70 L.Ed.2d 240 (1981); State v. Rook, 304 N.C. 201, 283 S.E. 2d 732 (1981), cert. denied ____ U.S. ____, 102 S.Ct. 1741, 72 L.Ed.2d 155 (1982).

the instructions "withdrew from the jury its final option to recommend a life sentence notwithstanding its earlier findings." State v. Pinch, supra, 292 S.E. 2d at 227. Now, realizing that a state may constitutionally require a recommendation of death upon the making of certain findings by the sentencer (Jurek v. Texas, supra; Adams v. Texas, supra), Pinch has shifted his ground. Instead of claiming a Federal question is presented because the State's interpretation of the North Carolina death penalty statute is unconstitutional - the claim made below - Pinch now suggests that a Federal question for review exists for this Court because the Supreme Court of North Carolina allegedly misread Furman v. Georgia, 408 U.S. 238 (1972) and its progeny and felt bound, as a matter of Constitutional law, to construe G.S. 15A-2000 to require a death penalty recommendation if all the issues in G.S. 15A-2000(c) are answered affirmatively. If it were true that the Supreme Court of North Carolina had acted as it did solely because it misconstrued this Court's decisions, then a Federal question is presented: United Airlines v. Mahin, 410 U.S. 623 (1973). However, a fair and complete reading of the portions of the Supreme Court of North Carolina's opinions dealing with this issue in State v. Pinch, supra; State v. Smith, supra; and State v. Williams, supra all reveal that the Supreme Court of North Carolina's construction of G.S. 15A-2000 to require a recommendation of death after certain findings are made was not based on a perceived constitutional requirement, but rather on a plain reading of the statute itself.

In State v. Pinch, supra, the case upon which State v. Williams, supra and State v. Smith, supra largely rely, the Court held that the instruction to the jury that they must return a recommendation of death if they found all three

issues submitted to them for consideration was proper, since it was based on the statutory criteria set forth in G.S. 15A-2000(b) and (c). The Court went on to say that the jury could not be allowed to exercise unbridled discretion and disregard the findings it made pursuant to G.S. 15A-2000(c), but rather must exercise guided discretion within the "carefully defined set of statutory criteria" (292 S.E. 2d at 227). The Court then cited State v. Goodman, 298 N.C. 1, 257 S.E. 2d 569 (1979) to support the proposition that the jury may not be instructed to "disregard the procedure outlined by the legislature and imposed the sanction of death at their own whim." 298 N.C. at 35, 257 S.E. 2d at 346. (emphasis added).

The North Carolina Supreme Court in Pinch construed G.S. 15A-2000. However, the thrust of the opinion in Pinch was not that the Supreme Court of North Carolina must, for constitutional reasons, construe its death penalty statute as it did, but rather, that the jury should not be allowed in making the sentencing decision to disregard the procedure outlined by the legislature. The Court's decisions in Pinch, Smith, and Williams nowhere state the North Carolina Supreme Court felt compelled by the Federal Constitution to interpret G.S. 15A-2000 as it did, but rather reiterate a plain reading of the statute required the result reached by the Court. In fact, in State v. Pinch, supra, the Court found it necessary to add a footnote citing Jurek v. Texas, supra for the proposition that the Supreme Court of North Carolina's construction of the statute in question is Constitutionally permissible. This alone clearly indicates that the Supreme Court of North Carolina was not interpreting its statute as it did due to some feeling of Federal Constitutional mandate. However, if there is any question as to the basis upon which the majority in the case now before this Court interpreted

the language of G.S. 15A-2000, that question is resolved by referring to the opinions by the North Carolina Supreme Court in State v. Williams, supra and State v. Smith, supra. In State v. Smith, supra the Supreme Court of North Carolina stated the instruction that the jury must return a verdict of death after making certain findings "comports with the procedure contemplated in G.S. 15A-2000(b)." 292 S.E. 2d at 275. In State v. Williams, supra, the Court rejected the argument that the jury despite its findings made pursuant to G.S. 15A-2000(c) ought still be able to return a life sentence if it desired. The Court stated:

> "The defendant argues that even if the jury fails to find sufficient mitigating circumstance(s) which outweigh the aggravating circumstances found, it may still, in its discretion, impose a sentence of life imprisonment. We find no authority for that position in G.S. 15A-2000(c) or elsewhere....G.S. 15A-2000(b) requires the jury to deliberate and render a sentence recommendation 'based upon' two considerations: (1) whether sufficient aggravating circumstances exist and (2) whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found. The statute specifically requires that the jury sentence recommendation be 'based on these considerations' - not unbridled discretion. G.S. 15A-2000(b)(3). This specific mandate is clear - it requires no interpretation." 292 S.E. 2d at 263 (emphasis added)

Justice Exum, the lone dissenter in the matter now before the Court as well as in State v. Smith, supra and State v. Williams, supra, argued initially that the majority decided to construe the statute "as it did on the sole ground that otherwise the statute would be subject to constitutional attack." 292 S.E. 2d at 230. However, he then accused the majority of having fallen into the same logical trap in reading G.S. 15A-2000 to which he had previously succumbed when, in State v. Rook, supra he wrote that:

> "the clear import of our statute is that a jury, upon finding the requisite existence of aggravating circumstances and their sufficient substantiality, may not recommend life imprisonment unless it further finds that the mitigating circumstances are sufficient to outweigh the aggravating circumstances." 304 N.C. at 243, 283 S.E. 2d at 757.

As he proceeded further in the dissent, he argued that the majority in construing the statute based their construction on a misreading of State v. Goodman, supra and then, finally, while admitting under Jurek v. Texas, supra the majority's interpretation of the state statute would pass Constitutional muster, he claimed his new view of how the statute should be read was more solidly supported by the decisions of the United States Supreme Court and is closer to the legislative intent of the North Carolina General Assembly.

While initially accusing the majority of deciding the statute due to a perceived constitutional compulsion, Justice Exum then asserted the majority construed the statute as they did due allegedly to reading the statute incorrectly as he had previously done and misreading state case law. Thus, the vast part of the dissent in Pinch, which Justice Exum adopted in his dissents in Smith and Williams, reaffirms what the majority opinions in Pinch, Smith and Williams clearly show: That the statute in question was construed by the Supreme Court of North Carolina as a matter of state law.

This Court must defer to the interpretation placed on a statute statute by the highest state court where, as here, the interpretation is made solely as a matter of local law: Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965); Scripto v. Carson, 362 U.S. 207 (1960); c.f. Hankerson v. North Carolina, 432 U.S. 233, 244-245 (1977). The North Carolina Supreme Court's interpretation of the statute is not repugnant to Federal Constitutional mandates. Jurek v. Texas, supra. Therefore, this Court ought not issue its writ of certiorari to the Supreme Court of North Carolina since there is no Federal question here presented for review.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Michael Edward Pinch's petition for writ of certiorari should be denied.

Respectfully submitted, this 5th day of October, 1982.

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CERTIFICATE OF SERVICE

I, Joan Herre Byers, Assistant Attorney General, do hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have on this date served a copy of the foregoing RESPONSE TO PETITION FOR WRIT OF CERTIORARI upon the Attorney of Record of Petitioner Michael Edward Pinch, by depositing same in the United States Mail, first class postage prepaid, and properly addressed as follows:

Mr. Adam Stein
Appellate Defender
Office of the Appellate Defender
Post Office Box 1070
Raleigh, North Carolina 27602

This the 5th day of October, 1982.

Joan Herre Byers
Assistant Attorney General